Supreme Court, U.S.
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In the Supreme Court of the United States

Clinton Gard,
Patricia Gard,
Petitioners

vs

City of Omaha,
Respondent

On Petition for Writ of Certiorari to the
Nebraska Court of Appeals

Petition for Writ of Certiorari

Clinton and Patricia Gard
Pro Se Petitioners
931 N 121 St.
Omaha, NE 68154
(402) 342-3150

QUESTIONS PRESENTED

1. Is the Nebraska Court of Appeals in conflict with federal or other court of appeals' decisions by affirming the decision of the Douglas County District Court granting summary judgment during ongoing court ordered discovery with no notice, instruction or time limits imposed by the court, no further hearings, motions, or stipulations from the time the motion to compel was granted?

2. Has Petitioner's right to due process as provided for in U.S. Const., Art. XIV, §1 been violated by the Nebraska Court of Appeals by affirming the decision of the Douglas County District Court granting summary judgment in favor of the Respondent City of Omaha?

3. Has the Nebraska Court of Appeals Opinion affirming the order of the Douglas County District Court departed so far from the accepted and usual course of judicial proceedings as to invoke the supervisory powers of the United States Supreme Court pursuant to Rule 10 by failing to acknowledge, analyze or apply relevant facts on the record never disputed by the Defendant, referenced and cited by Plaintiffs with applicable law in every document and during oral argument before the courts?

PARTIES TO THE PROCEEDINGS

Plaintiffs/Petitioners

Clinton C. Gard

Patricia S. Gard

Defendant/Respondent

City of Omaha, a political subdivision

Located within Douglas County Nebraska

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The opinion of the Nebraska Court of Appeals (18 Neb. App. 504), affirming the order of the Douglas County District Court attached hereto as App. 1. The Order of the Douglas County District Court is unreported, attached hereto as App. 16.

JURISDICTION

The Opinion of the Nebraska Court of Appeals was entered on August 3, 2010 . (18 Neb. App. 504) Timely filed Motion for Rehearing was denied on September 1, 2010. Timely filed Petition for Further Review to the Nebraska Supreme Court denied and entered on November 10, 2010. Pursuant to Rule 13.1 this petition is filed within 90 days of that date. This Court's jurisdiction rests on 28 U.S.C. §§1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. XIV, §1 states that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

1) FRCP Rules 37, 54 (App. 27); 2) Nebraska Supreme Ct. Rule §6-1110 (App. 29); 3) NE Rev. Stat. §13-919(3) (App. 29); 4) Omaha Municipal Codes 1980, Sec. §26-28; 1980 Sec. §26-59 *State law references: Similar provisions, R.R.S. 1943, § 14-3, 119;*1980 Sec. §26-60, *State law references: Similar provisions, R.R.S. 1943, §14-3, 120;* 1980, §18-2, 18-4, 18-5 (App. 30-33)

STATEMENT OF THE CASE

INTRODUCTION

Property rights and the right to quiet enjoyment of property are fundamental rights that share well defined and consistent case law across federal, state, and municipal jurisdictions. Notice laws concerning the property rights of abutting property owners are held to the highest of standards in statutory law; they are non-discretionary, allow no room for policy judgment (*Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993)).*

The law is very clear that the failure of government to warn of dangerous conditions is so important that to violate this duty results in a waiver of governmental immunity. By withholding knowledge it then "cannot rely on a statute of limitations defense. These laws serve to protect from loss of rights protected by *U.S. Const., Art. XIV, §1. Mondelli v. Kendel Homes Corp., 262 Neb. 263, 631 N.W.2d 846 (2001).Frezell v. Iwersen 436 N.W. 2d 194, 231 Neb. 365. C.A. 8 (Neb.) 1991.*

"The Disappearing Facts"

At the time of granting summary judgment the lower court had undisputed facts and related law referenced numerous times in multiple documents that show the City of Omaha employees and public officials violated several non-discretionary statutory duties, including the failure to follow state and municipal statutes regarding notices in connection with street improvements by petition that abut Petitioners property.

The facts show Defendant had knowledge of a possible claim 5 years prior to Plaintiffs becoming aware of their injury. The facts show Defendant failed in their non-discretionary duty to warn of dangerous conditions they became aware of by communications of informed businesses and discussions of dangerous conditions at a hearing that Plaintiffs or the public were not aware of.

Defendant also failed to disclose issues at the time of another lawsuit regarding the rights of abutting property owners to the Improvements several years prior to Plaintiffs damages. So Petitioners were already in the position for the worse when they became aware of their claim for damages in October 2006.

After damages occurred the Defendant three times (once after a second accident occurred six months later) misled Plaintiffs that the federal government prohibited any type of barrier or berm to be constructed at the Intersection

These facts are the pinnacle of relevant facts regarding a waiver or exception to the statute of limitations and governmental immunity pursuant to the Nebraska Political Subdivision Tort Claims Act. **And yet the Defendant and the courts remain silent to these facts and refuse to apply them to any argument** determining a waiver to the statute of limitations or an exception for compelling circumstances as provided for in the doctrine of equitable estoppel or continuing tort.

This court will be shown these facts and related law have been persistently plead by Petitioners in every document submitted before both courts, even as early as within their claim to the City of Omaha. These facts were specifically raised during oral argument before the Court of Appeals.

By examining the full record, the pleadings, the responses of Defendant, and the decisions of the courts, a disturbing pattern emerges of complete avoidance of these facts by Defendant, the district court, and the Nebraska Court of Appeals.

This "disappearing facts trick" occurred as a type of tag team play between the City of Omaha and the courts. The facts are not acknowledged or rebutted at any time by Defendant City of Omaha and then not acknowledged , analyzed or applied at any time within any decision from either the district court or the Nebraska Court of Appeals.

Detailed argument concerning these facts, referred to as the "Omitted Facts" were specifically addressed within Plaintiffs Brief in Support of Appellants Motion for Rehearing and within Appellants Petition for Further Review.

A revealing example of this "trick" occurred during oral argument (audio and video still available on Nebraska Supreme Court website) before the Court of Appeals while Plaintiff Patricia Gard attempted to bring this avoidance issue into the light and specifically raised these facts and law pertaining to the Defendant's statutory failure of notice laws regarding street improvements by petition and warning of dangerous conditions. The panel asks no questions pertaining to these facts, and the Defendant City of Omaha does not acknowledge or attempt to rebut them. (App. 82)

These facts must be considered, or there are still genuine issues and the facts and law will not have been considered in the light most favorable to Plaintiffs. Summary judgment is improper when these conditions still exist.

Summary judgment during court ordered discovery is in conflict with other state court of appeals, however, in the light of the discovery of a previous court case tied to the same issues being withheld by the City of Omaha under a court order to produce all documents in connection with the Improvements, the decision to uphold summary judgment becomes extreme and manifestly unjust.

The arguments and facts herein will show this court that summary judgment in this case is in conflict with other state courts of appeal, federal law, and violates Petitioners' right to due process as provided for in U.S. Const., Art. XIV, §1.

STATEMENT OF FACTS

Plaintiffs reside at 931 N 121 St, Omaha, NE (E7)(E8)V. II on a lot deemed a "double frontage lot" *Omaha Mun. Code, Article II, (Code 1980, 55-11) Sec 55-25 L* that abuts the t-intersection at Miracle Hills Dr. and 120th Sts. ("Property") In Omaha, NE. (T212)(T240) (App. 79-80) All four lanes of westbound traffic on Miracle Hills Dr. directly faces Plaintiffs property and house before turning north or south on 120th St. (T212) (T240) (App. 81)

2007 traffic count at the Intersection exceeds 15,000 cars daily (T298). On January 9, 2001 street improvements by petition (hereinafter "Improvements") within Resolution 23, an agreement between the City of Omaha, West Corporation, Silvercrest Development, Inc., Miracle Hills Park Assn., and Miracle Hills VI L.P. was approved by the City of Omaha. (T171-T187) The Improvements were for the purpose of accommodating increasing traffic volume due to business expansion within Miracle Hills Business Park, in addition to a planned increase in traffic due to the Dodge Street overpass construction to occur in approximately 2006. Only one hearing was held on January 9, 2001 regarding Improvements without required published notice. (T171-T187) (T335-336 audiotape) (T41). Members of the City Council, planning dept., and an engineer from Omaha Public Works were among those present. (T335-336 audiotape). The Improvements were introduced, hearing held, voted on, and adopted within 24 hours. These Improvements were approved without obtaining the signature of any owner of the Property as required by law. (T171-T187)(T335-336 audiotape) The City was notified of dangerous conditions in communications received from informed businesses in the area. (T323-334) (T336 audiotape). Dangerous conditions were discussed at the hearing on January 9, 2001 including references to traffic volume increases occurring as late as 2006 in connection with the Dodge Street overpass construction. (T335-336 audiotape). Plaintiffs

purchased the Property on 1/12/2001 with no disclosures from the City and unaware of any possible future dangerous conditions. (E17, 8:22-25, V.II) In approx. 2002-2003 the Improvements were constructed. On October 21, 2006 an accident resulted in a vehicle crashing through the t-intersection, striking Plaintiff house. (E9)(E17:86-93) (App. 75, 76). Plaintiffs immediately contacted the city with their concerns. (E2:5-6) (E17:47-52) (E17:60) (T221-223). The City stated twice federal guidelines prohibited any type of barrier at this location, and attached an informational sheet published by a federal agency (T53-56) Six months later, on April 25, 2007 another accident resulted in two vehicles crashing into Plaintiffs yard. (E10)(E17:94-95) (App. 77, 78) The City again stated federal guidelines applied. (T222-223) In May of 2007 Plaintiffs contacted the Federal Highway Administration (FHWA) and found that federal guidelines did not apply at this location. (T224) (E16:1, Vol. I) During June and July of 2007 the Federal Highway Administration and Nebraska Department of Roads Safety Committee (NDOR) induced the City of Omaha to participate in 2 safety meetings where one type of barrier was discussed involving a combination of cabling and water filled containers. (E4:5-11 V. II) (T228-229) (T234-256) (E16:2-6). On October 2, 2007 Plaintiffs received a letter from Defendant stating, "The conclusion of the committee was that not one solution could provide absolute and reasonable protection..."(T257-258). However NDOR suggested that Defendant may investigate other options by

contacting the Midwest Roadside Safety Facility at the University of Nebraska. (T234) Six months later, on April 22, 2008 Plaintiffs filed a claim with the city of Omaha. (E14). The City held Plaintiffs' claim for six months, and on Sept. 16, 2008 Plaintiffs received a letter denying the claim only on the basis of governmental immunity. (E15 V. II). On March 12, 2009 Plaintiffs filed a complaint in Douglas County District Court. (T1-13). On May 29, 2009 Patricia Gard was deposed by the City of Omaha for approximately 2 ½ hours. (E17 V. II) During this deposition Patricia put forth ideas for possible solutions, including a natural berm, or changing Miracle Hills Drive to a one-way street flowing away from their property. (T259) (E17, deposition of Patricia Gard, pages 59-63, page 64:1-22) V. II (E17, Deposition of Patricia Gard, Exhibits 11 & 12) V. II On September 24, 2009 a hearing was held for Defendants Motion for Summary Judgment and Plaintiffs Motion to Compel Discovery. The Court took Defendants motion under advisement and sustained Plaintiffs motion. (E13:12-24) (E22:23-24) (App. 50). On October 26, 2009 Plaintiffs received additional evidence from the City of Omaha, and on November 25, 2009 Plaintiffs met Defendants attorney at a construction company and received further records. Four days later and with no further hearings, Plaintiffs received an Order by mail granting summary judgment to the City of Omaha on November 30, 2009 (T337) Plaintiffs filed appeal on December 16, 2009. Plaintiffs provided oral argument before the Court of Appeals on June 18, 2010. The Court of

Appeals affirmed the decision of the district court on August 3, 2010 and denied Appellants motion for rehearing on September 1, 2010.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE NEBRASKA COURT OF APPEALS IS IN CONFLICT WITH OTHER STATE COURT OF APPEALS BY CONCLUDING THAT SUMMARY JUDGMENT IS PROPER DURING ONGOING COURT ORDERED DISCOVERY.

Other state courts of appeal have reversed cases where a lower court has granted summary judgment during ongoing court ordered discovery. The courts have reasonably determined that by granting a motion to compel discovery a court is in effect stating that summary judgment would be improper during this time because genuine issues of material fact may exist.

In *Roy H. Payne, Jr., and Elizabeth Burger-Payne v. Cudjoe Gardens No. 3D02-567 [3] 837 So.2d 458, 2002.FL.0005624 December 18, 2002* the Florida Court of Appeals reversed a decision where the issue before it was summary judgment during a sustained and ongoing motion to compel discovery. Within its opinion the court relied upon an abundance of Florida case law in making this determination:

"[21] It is axiomatic that Summary Judgment may not be granted unless the moving party is able to show that no genuine issues of material fact exist. See Holl v. Talcott, 191 So. 2d 40, 43-44 (Fla. 1966); Kemper v. First Nat'l Bank of Dayton, Ohio, 277 So. 2d 804 (Fla. 3d DCA 1973). Where discovery is not complete, the facts are not sufficiently developed to enable the trial court to determine whether genuine issues of material facts exist. See Singer v. Star, 510 So. 2d 637, 639 (Fla. 4th DCA 1987). Thus, where discovery is still pending, the entry of Summary Judgment is premature. See Smith v. Smith, 734 So. 2d 1142, 1144 (Fla. 5th DCA 1999)("Parties to a lawsuit are entitled to discovery as provided in the Florida Rules of Civil Procedure including the taking of depositions, and it is reversible error to enter summary judgment when discovery is in progress and the deposition of a party is pending."); Henderson v. Reyes, 702 So. 2d 616, 616 (Fla. 3d DCA 1997)(reversing the entry of Summary Judgment where depositions had not been completed and a request for the production of documents was outstanding.); Collazo v. Hupert, 693 So. 2d 631, 631 (Fla. 3d DCA 1997) (holding that a trial court should not entertain a motion for summary judgment while discovery is still pending); Spradley v. Stick, 622 So. 2d 610, 613 (Fla. 1st DCA 1993); Singer v. Star, 510 So. 2d 637 (Fla. 4th DCA 1987)."

> [24] Accordingly, we find that summary judgment was improvidently granted prior to the completion of discovery and, accordingly, reverse the Order granting the association's Motion for Summary Judgment and remand the matter for further proceedings specifically including additional discovery.

A document in conflict with an affidavit submitted by Defendant supporting summary judgment was obtained from Defendant four days prior to summary judgment being granted. The nature of this document was before the Nebraska Court of Appeals, and because misrepresentation occurred by this same individual within documents on the record, this document and possibly further documents may be applied to a waiver or exception to the statute of limitations.

Just prior to the mandate being issued, Petitioners discovered by their own due diligence a previous case in the same district court where the City of Omaha was defendant involving the same development agreement that includes the street improvements by petition that are the basis of Petitioners' claims against the City of Omaha. The City of Omaha should have disclosed this case pursuant to the sustained motion to compel as "all documents pertaining to the improvements " were court ordered to be produced. Petitioners immediately informed the Nebraska Court of Appeals of

this discovery within Emergency Motion to Reinstate Appeal. (App. 51)

The Nebraska Court of Appeals denied all motions raising the new discovery issue, with no written analysis of the facts or related law regarding these emergency motions, thus condoning the Defendant City of Omaha's contempt of the lower court.

At this juncture, summary judgment standards dictate that summary judgment should be reversed, ongoing discovery revived and sustained, and Petitioners' allowed motion for sanctions on the City of Omaha for contempt of court for withholding information about a court case that involved the same improvements, and decided issues concerning abutting property owners, with Petitioners being a part of this group.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE ACTIONS OF THE NEBRASKA COURT OF APPEALS AFFIRMING THE DECISION OF THE DISTRICT COURT HAS VIOLATED PETITIONERS' RIGHT TO DUE PROCESS PROVIDED FOR IN U.S. CONST. ART. XIV, §1.

Propositions of Law

1. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

Where it is not clear from the record whether the trial court relied upon improper evidence, the better course is to reverse a grant of summary judgment. Summary judgment is an extreme remedy because it may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).*

2. On a motion for summary judgment, the court is required to view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom it is directed and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. *Mayer v. Howard, 220 Neb. 328, 370 N.W.2d 93 (1985).*

3. The Nebraska Supreme Court here acknowledges that a tortfeasor can engage in a continuing, cumulative pattern of tortious conduct, which can affect a statute of limitations. The Court herein also sets out the damages which can be claimed when the statute of limitations is at play in such an action. *Alston v. Hormel Foods Corp., 273 Neb. 422 (2007)*

4. A party entitled to estoppel need not in all cases formally plead the estoppel, and if the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the

the law arising therefrom. *Greer v. Chelewski, 76 N.W. 2d 438, 162 Neb 450.*

5. In order to invoke the doctrine of equitable estoppel, a party must first satisfy the following six elements: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming estoppel. *Id.* Each element of equitable estoppel must be proved by clear and convincing evidence. *Double K,Inc. v. Scottsdale Ins. Co. , 245 Neb. 712, 515 N.W.2d 416 (1994); Agrex,Inc. v. City of Superior , 7 Neb. App. 237, 581 N.W.2d 428 (1998).*

6. The discretionary function or duty exemption in the Political Subdivisions Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. In other words, the political subdivision is liable for the negligence

of its employees at the operational level, where there is no room for policy judgment. *Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993).*

7. When a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard. *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).*

State Statutes and Municipal Ordinances

1. State law references: Similar provisions, R.R.S. 1943, § 14-390. Sec. 26-59. Examination of petition. Omaha Mun. Code 1980, § 26-59 (App. 27)

2. State law references: Similar provisions, R.R.S. 1943, § 14-3,119. Sec. 26-60. Publication of notice. Omaha Mun. Code 1980, § 26-60 (See App. 27)

3. Nebr Rev. Statute §13-919 (3) Nebr. Political Subdivisions Tort Claims Act (See App. 27)

4. Nebr. Supreme Court Rules § 6-1110. Form of pleadings. (See App. 27)

A. The Court of Appeals Opinion (hereinafter "Opinion") did not consider or acknowledge the fact that the city had knowledge of dangerous conditions prior to the first accident, and failed to warn of such conditions as required by statute within any discussion, analysis, or opinion of any argument in this case at any time, even as the transcript, bill of exceptions, briefs, and Plaintiff Patricia Gard's oral argument on June 18, 2010 references this undisputed fact numerous times.

Plaintiffs searched public records after the second accident in 2007 and found evidence that from 2001 forward Defendant had knowledge of existing dangerous conditions prior to the first accident in October of 2006 (T323-334) (T336 audiotape) and discussed future dangerous conditions that may develop as late as 2006 (T336 audiotape) even while passing Resolution 23 (E11:1-17) allowing for development and expansion that created even greater risks due to increased traffic volume. The City failed in its nondiscretionary duty of providing notice of a dangerous condition prior to the first accident on October 21, 2006 *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).*

B. The Opinion did not consider or acknowledge within any discussion, analysis, or opinion that the city had failed in their statutory, non- discretionary duties concern-

ing the petition for street improvements that led to the changes at the intersection prior to the occurrence of the first accident, even as the transcript, bill of exceptions, briefs, and Plaintiff Patricia Gard's oral arguments on June 18, 2010 reference this undisputed fact numerous times. (T306-T322) *Omaha Mun.Code 1980, § 26-59)(Code 1980, § 26-60)* The above actions constitute violations of non-discretionary duties bound by law with no room for policy judgment. *Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993).*

C. The Opinion errs by assuming the nature of and/or weighing the evidence that was obtained under the sustained motion to compel but not yet seen by the lower court, rather than by actual fact or knowledge.

The Opinion, page 512 states, "This additional evidence could not have affected the time of the filing of their claim or the time that they could have known that they had a claim." There is no possible way for the Court of Appeals to determine that evidence received or yet to be received under the order to produce documents but not yet in the transcript is not relevant to establishing a waiver, estoppel, or substantial compliance with notice requirements.

A document dated June 20, 2001 obtained under the sustained motion to compel discovery shows that Mr. Harry Owen, who was the Plaintiffs

initial city contact after the first accident, was a project engineer for the improvements at the intersection in 2002-2003. In an affidavit in support of Defendant's Motion for Summary Judgment provided to the court Mr. Owen states that he has been employed by Omaha Public Works as a traffic engineer for only 2 1/2 years. (E2:1-10 Vol. II) There was already facts on the record showing that Mr. Owen also incorrectly informed Plaintiffs twice that the federal government prohibited changes to the intersection. While the court of appeals cannot weigh evidence not yet on the record, where it is not clear from the record whether the trial court relied upon improper evidence, the better course is to reverse a grant of summary judgment. *Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).* When ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations. *Kenney vs. Swift Transportation Co. 347 F.3D 1041, 1044 8th Cir 2003.*

At a hearing on September 24, 2009 the Defendant offered an affidavit of Mr. Tim O'Bryan, a Public Works engineer states that the intersection improvements were "substantially completed sometime in April 2002." (E19:1-2 Vol. II) Patricia Gard objected to the affidavit with concerns about the credibility of the information, as no documentation was attached. (E20:8-16) Mr. O'Bryan was not present to testify. The sustained motion to compel discovery was not only about the date of the actual construction, it involved a request for all

documents concerning the construction of the turning improvements. (T125) **The court stated there could be exceptions to the statute of limitations (E13:12-21 Vol. I) (App. 36) , and thus all documents received under the court order to produce documents could possibly become a factor in determining an exception to the statute of limitations defense.** This statement raises the issue of the timeline of the changes at the intersection in this case. The development agreement was approved in 2001. The date of the actual construction of the improvements is in dispute, probably occurring in late 2002 or early 2003. But a matter of prime importance is when the traffic volume changed as a result of these changes. Business expansion was leading to increased volume on or about the time of the intersection changes, however it must be noted that there was particular concern expressed at the hearing in January 2001 (no public notice of hearing or notice to Plaintiffs as required by law) that a "crush of traffic" was anticipated at the intersection when traffic bypassing the new Dodge Street overpass occurred beginning in approximately in 2006 that would combine with the increased business volume. (T323-334) (T336 audiotape) This additional anticipated change in traffic volume coincides with the timing of the first accident occurring in October of 2006.

In addition to the above facts, a discovery of a previous lawsuit involving the same development

agreement that included street improvements abutting Plaintiffs' property, and issues decided concerning abutting property owner rights, withheld by Defendant during court ordered discovery, dispels any doubt that genuine issues still exist and summary judgment was premature.

The Nebraska Court of Appeals upon this revelation should have granted the unopposed motion to reinstate appeal, reversed and remanded summary judgment, and the ongoing court ordered discovery continue with sanctions allowed pursuant to Defendants' grievous contempt of court for non-disclosure of the prior case that includes facts about the construction of the improvements and addresses the due process rights of abutting property owners to the project. *(FRCP 54, 34(a))*

Due to the above circumstances, the trial court may have relied upon improper evidence. *Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).* The issues within *Waite v. City of Omaha* that were withheld by Defendant during a sustained motion to compel discovery cast a reasonable doubt that no issues of material fact exist. *Mayer v. Howard, 220 Neb. 328, 370 N.W.2d 93 (1985).*

D. The Opinion errs by stating that the Gards had failed to prove all elements of estoppel when in fact the record supports the proof of all elements being met in two separate sets of circumstances.

As outlined in Arguments A and B, relevant facts were omitted from consideration that would allow an exception for estoppel. The consideration of the omitted facts will bring to light the "compelling circumstances where right and justice so demand" where estoppel is invoked against a governmental agency. The facts showing estoppel and waiver were within the issues made by pleadings and evidence, therefore Plaintiffs are entitled to the benefit of the law. *Greer v. Chelewski, 76 N.W. 2d 438, 162 Neb 450, Robbins v. National Life & Acc. Ins. Co., 157 N.W. 2d 188, 182 Neb. 749, Nebr. Supreme Court Rules§ 6-1110. Form of pleadings.* See App. 94 attached herein for a table showing the circumstances that shows each element of equitable estoppel proved by clear and convincing evidence. *Double K, Inc. v. Scottsdale Ins. Co. , 245 Neb. 712, 515 N.W.2d 416 (1994); Agrex ,Inc. v. City of Superior , 7 Neb. App. 237, 581 N.W.2d 428 (1998).*

Plaintiffs did not fail to plead facts and arguments that support equitable estoppel, and provided evidence that the City fraudulently misled and concealed relevant information. T260, T222-223) *Muller v. Thaut, 430 N.W. 2d 884, 230 Neb. , Olsen v. Olsen, 657 N.W.2d 1, 8 (Neb. 2003*

E. The Opinion includes misleading or inaccurate references to the record resulting in improper, misleading, or irrelevant analysis of Plaintiffs' arguments.

1) *"More important though, the Gards admit that the final order disposed of the merits of their case of a statute of limitations defense."* (Page 512,opinion) What bearing does admitting what the final order states have on the analysis of our arguments? Admitting that a document states something does not indicate that one agrees with what is stated. Of course Plaintiffs admit what the final order *states*, but we certainly don't agree with it; the reason we appealed the final order is because we believe the final order is in error and should be reversed and remanded.

2) *"Here, however, the City has never indicated that it may erect a barrier."* (Page 512, opinion) The record clearly shows that the city was engaged in a possible type of barrier type of design as a solution while attending the Nebraska Department of Roads Safety Committee meetings. For a brief amount of time in 2007, the City of Omaha was engaged and agreeable to discussing various types of barriers. (E4:5-11 Vol. II) (E16:2-6) (T228-229) (T234-256) Emails between Glen Hanson and Todd Pfitzer of Omaha Public Works shows discussions and questions about possibly ordering materials in connection with a certain type of barrier. (T238)

Omission of relevant facts and evidence on the record before the lower court and now the court of appeals creates a bias in favor of the Defendant, rather than a review of facts in the light most favorable to the Plaintiffs that is required by sum-

ary judgment standards. *Mayer v. Howard, 220 Neb. 328, 370 N.W.2d 93 (1985). Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).*

The failure to acknowledge and apply the facts discussed in these Arguments of such magnitude and relevance to our case shows an abuse of discretion by the lower court that should have been reversed and remanded by the Court of Appeals, rather than mirroring the same errors.

We endure ongoing dangerous conditions while the city maintained silence of the above facts even after the second accident, misled Plaintiffs by stating the federal government prohibited changes that may have prevented two other vehicles from damaging our property, and only by due diligence of the Plaintiffs was it found the federal government was not involved and that the changes to the intersection were done by a joint agreement between the City of Omaha and several businesses. It was by the due diligence of the Plaintiffs that the Nebraska Department of Roads became involved, with the City of Omaha finally showing a short-lived willingness to find a solution before walking away from the problem on Oct.2, 2007. (T257)

To consider the facts in the light most favorable to the Plaintiffs it is imperative to consider the failure of the Defendant to obey laws governing a

political subdivision's duties involving street improvements by petition and their duty to warn of dangerous conditions. The continuous harm and future possibility of further damages are so compelling that an improper and unethical application of a statute of limitations defense must not be allowed as a bar to justice. *Muller v. Thaut, 430 N.W. 2d 884, 230 Neb. 244*

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE ACTIONS OF THE NEBRASKA COURT OF APPEALS AFFIRMING THE DECISION OF THE DISTRICT COURT DEPARTS SO FAR THAT IT IS NECESSARY TO INVOKE THE SUPERVISORY POWERS OF THIS COURT TO OBTAIN DUE PROCESS.

Nebraska judicial code of conduct principles have not been upheld by the Douglas County District Court, sanctioned and mirrored by the Nebraska Court of Appeals by upholding summary judgment in favor of the City of Omaha. The facts herein describe intentional, ongoing suppression of relevant facts that would alter the outcome of the case and render summary judgment improper.

CONCLUSION

Other state courts of appeal have decided that it is improper to grant summary judgment during court ordered discovery, and even in cases reversal of summary judgment even to revive a pending

motion to compel discovery. These courts have applied reason, logic, and fairness to this situation. In these cases the courts did not attempt to speculate or discredit evidence obtained or yet to be obtained under court ordered discovery but not yet in the record. *Celotex Corp. v. Catrett 477 U.S. 317, 106 S.Ct. 2548*

By granting court ordered discovery, a court has determined that the first "prong" of the long accepted summary judgment standard cannot yet be satisfied

So how can a court justify granting summary judgment where no discovery time limits were imposed and not two months passed from the granting of the motion with no finishing action, no closure or determination of either compliance or non-compliance of court ordered discovery in order that both tests of summary judgment are satisfied?

Petitioners urge this court to consider issuing an opinion that it would always be improper for a court to grant summary judgment during court ordered discovery where there have been no time limits imposed, no instructions given by the court, no stipulation, motions, or further hearings after a motion to compel is granted. Issuing such an opinion would preserve the integrity and intent of summary judgment standards by eliminating speculation by the courts of unseen or yet to be ob-

tained evidence during court ordered discovery such as occurred within this case.

In this case, Petitioners have revealed that issues concerning genuine facts on the record were never acknowledged, analyzed or applied by the courts to arguments relating to a waiver or exception to the statute of limitations, and genuine facts not yet on the record pursuant to court ordered discovery that could be applied to a waiver or exception to the statute of limitations must be considered before summary judgment is granted.

Petitioners have shown this Court 1) Article XIV §1, 2) other state courts of appeal 3) federal case law concerning summary judgment 4) Nebraska law and 5) judicial code of conduct all support reversal of summary judgment in this case, therefore, this

WRIT OF CERTIORARI SHOULD BE GRANTED

RESPECTFULLY SUBMITTED,

/s/ Clinton C. Gard
/s/ Patricia Gard
931 N 121 St.
Omaha, NE 61854
(402) 342-3150

OPINION OF THE NEBRASKA COURT OF APPEALS

(Designated for Permanent Publication)

Case Title

CLINTON GARD AND PATRICIA GARD, APPELLANTS,

V.

CITY OF OMAHA, APPELLEE.

Case Caption

GARD V. CITY OF OMAHA

Filed August 3. 2010. No. A-09-1266

Appeal from the District Court for Douglas County:

J. PATRICK MULLEN, Judge. Affirmed.

Clinton Gard, pro se.

Patricia Gard, pro se.

Alan M. Thelen, Deputy Omaha City Attorney, and Rosemarie R. Horvath for appellee.

GARD v. CITY OF OMAHA

Filed August 3, 2010. No. A-09-1266.

1. Summary Judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and

that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.

3. **Political Subdivisions Tort Claims Act: Limitations of Actions.** For purposes of Neb. Rev. Stat. §13-919(1) (Reissue 2007), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.

4. **Torts: Limitations of Actions.** When an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.

5. **Estoppel.** An equitable estoppel rests largely on the facts and circumstances of the particular case.

6. **Equity: Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand.

7. ____: ____. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or

concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

8. **Equity: Estoppel: Limitations of Actions.** The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.

MOORE AND CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After errant cars entered the backyard of Clinton Gard and Patricia Gard on two occasions, the Gards filed a claim with the City of Omaha (City) and, after it was denied, filed a lawsuit against the City. The district court concluded that the suit was barred by the statute of limitations

and entered summary judgment in favor of the City. Because we conclude that the claim and the lawsuit were not timely filed, we affirm.

BACKGROUND

On January 12, 2001, the Gards purchased property located on North 121st Street in Omaha, Nebraska. Their property is located at the top of a T-intersection formed by Miracle Hills Drive (which runs generally east and west) and 120th Street (which runs north and south). Miracle Hills Drive has four westbound lanes which end at 120th Street; traffic in the two left-hand lanes is to turn left onto 120th Street, while traffic in the two right-hand lanes is to turn right. The intersection has traffic signals, including arrows indicating that traffic has to turn either left or right because the road ends.

On October 21, 2006, a drunk driver traveling westbound on Miracle Hills Drive failed to turn onto 120th Street and proceeded through the intersection and onto the Gards' property. The vehicle traveled through an existing tree line and a small retaining wall before crashing into the Gards' house. The Gards expressed concern to the City about the lack of a barrier to prevent errant traffic from entering their yard, but the City responded that it would not construct any type of barrier.

On April 24, 2007, two vehicles heading westbound on Miracle Hills Drive proceeded through the intersection and came to a stop in the Gards' backyard. The Gards again communicated with the City about a barrier, but the City again refused to

construct a barrier or offer any alternative to protect the Gards' property.

On April 22, 2008, the City received a claim filed by the Gards against the City under the Political Subdivisions Tort Claims Act (Act), seeking damages of $45,890. The City denied the claim on September 16.

On March 13, 2009, the Gards filed a complaint against the City. They alleged that the City had a duty to protect its citizens and property owners from harm and to not design intersections in such a manner as to increase the danger to the Gards, their guests, and their property. They alleged that the City was negligent in failing to provide any barrier or reasonable alternative between the intersection and the Gards' property. The Gards alleged that they had suffered damage to their property, diminution in value of their property, and loss of the use and enjoyment of their backyard. They requested that the court provide injunctive relief and order the City to install barriers to protect the Gards' property.

The City raised a number of affirmative defenses in its responsive pleading. Among the affirmative defenses alleged by the City were that the Gards failed to file a timely claim with the City as required by Neb. Rev. Stat. §13-919(1) (Reissue 2007) and that the action was barred by the statute of limitations contained in that section. The City subsequently moved for summary judgment.

Evidence showed that the city council approved the construction of the turning lane improvements

at the T-intersection in a resolution dated January 9, 2001. The changes included an additional left-turn lane for westbound traffic on Miracle Hills Drive and traffic signal modifications. The T-intersection was redesigned to better move increasing westbound traffic in the area.

Harry Owen, a traffic maintenance engineer employed by the City, stated in an affidavit that after he spoke with the Gards in October 2006, he checked the accident history for the intersection and discovered that this was the first accident of its kind reported at that location. On October 30, Owen wrote a letter to the Gards explaining the City's position and stating that the placement of a guardrail would violate several federal standards that the City must follow. Owen received correspondence from the Gards on November 2 and December 1, and he e-mailed the Gards on December 26.

On April 25, 2007, the Gards wrote to the mayor's office. On May 7, a different traffic engineer with the City, Todd Pfitzer, wrote the Gards a letter explaining the reasoning behind the City's denial of their request for guardrails or barriers at the intersection. Pfitzer stated that he would order that the diamond-shaped signs with reflectors be increased to the maximum allowable size to emphasize to approaching traffic that the roadway does not continue west through the intersection. Pfitzer again wrote the Gards on October 2 to inform them that the Nebraska Department of Roads Safety Committee, which had heard the Gards' concerns, concluded that "not one

solution could provide absolute and reasonable protection" to both the driver of the vehicle and the Gards' property and family. The letter informed the Gards that the City would not be installing a barrier along the west side of the intersection. On October 11, the Gards wrote Pfitzer and suggested that the City look at changing the flow of traffic on Miracle Hills Drive.

Patricia testified in a deposition that at the time the Gards purchased their house, 120th Street had two southbound turning lanes and one northbound lane. Later, an additional northbound turning lane was added at the intersection. Patricia also testified that the traffic light facing Miracle Hills Drive was a "lower light positioned on a pole" which was not visible above the tree line. It was replaced with a large pole off to the north side of the Gards' property with a "huge" suspended arm that extends over the intersection. She testified that as of October 30, 2006, she had concerns about the intersection, she had expressed the concerns to the City, and the City had rejected her proposed solutions. The Gards did not know of any law or regulation which would require the City to install something in between 120th Street and the Gards' backyard.

After receipt of exhibits relating to the motion for summary judgment, the court then took up the Gards' motion to compel discovery, which they had filed approximately 1 week before the hearing. The City offered the affidavit of a construction engineer for the public works department who stated that he attempted to retrieve the department's construction

file on the intersection redesign project as requested by the Gards, but that he was unable to locate it after a thorough search of the storage area and that "it apparently has not been retained." He reviewed information in the City's possession and determined that the project was bid in June 2001, that construction began in August, and that the construction was substantially completed sometime in April 2002. The court sustained the Gards' motion and ordered the City to search for requested documents and to supply them to the Gards if found.

On December 1, 2009, the district court entered an order granting summary judgment. The court determined that the Gards' claim accrued on October 21, 2006, when they became aware of the problem, and that the Gards failed to bring their claim in writing to the City within 1 year after the claim accrued. The court stated that the Gards' claim was outside the statute of limitations and that the court therefore lacked subject matter jurisdiction.

The Gards timely appeal.

ASSIGNMENTS OF ERROR

The Gards assign, consolidated, that the district court erred by (1) failing to apply the continuing tort doctrine to the running of the statute of limitations, (2) failing to apply the doctrine of equitable estoppel, (3) granting summary judgment when issues of material fact existed, and (4) granting summary judgment when evidence was still being

obtained under a motion to compel discovery that had been sustained.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Ballard v. Union Pac RR. Co., 279 Neb. 638, 781 N.W.2d 47 (2010).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. City of Fremont v. Kotas, 279 Neb.720, 781 N.W.2d 456 (2010).

ANALYSIS

Whether Suit Is Barred.

The district court concluded that the Gards' suit was barred by the statute of limitations, and the Gards argue that it should not be barred for several reasons.

[3] Section 13-919(1) provides:

> Every claim against a political subdivision. . . shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as other wise provided in this section, all suits permitted

> by the act shall be forever barred unless begun within two years after such claim accrued.

The first question, then, is: When did the Gards' claim accrue? For purposes of § 13-919(1), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence. *Polinski v. Omaha Pub. Power Dist., 251 Neb. 14, 554 N.W.2d 636 (1996).* The Gards' claim accrued on October 21, 2006, when the vehicle crashed through their yard and into their house. Thus, under § 13-919(1), they were required to submit a written claim by October 21, 2007, and to begin suit by October 21, 2008. The Gards did not submit their claim until April 2008 and did not file suit until March 2009. Thus, the Gards did not comply with the Act's time requirements.

We reject the Gards' contention that the last injury to them occurred on April 24, 2007, making their April 2008 claim timely. As discussed above, for purposes of the Act, the relevant question is when their cause of action accrued, not when they last suffered an injury.

The Gards' reliance upon a recent case is misplaced. In the Gards' reply brief, they cite to *Villanueva v. City of South Sioux City, 16 Neb. App. 288, 743 N.W.2d 771 (2008)*, and assert that they substantially complied with the notice requirements. The *Villanueva* case, however, dealt with requirements of Neb. Rev. Stat. §13-905 Reissue 2007) regarding the *content* of the claim. The in-

stant case involves statutory time limits for filing of the claim and the lawsuit. In *Big Crow v. City of Rushville, 266 Neb. 750, 754, 669 N.W.2d 63, 66-67 (2003)*, the Nebraska Supreme Court stated, "Because compliance with statutory time limits such as that set forth in [Rev. Stat.] §13-906 [2007) can be determined with precision, the doctrine of substantial compliance has no application in these circumstances." We think the same can be said of the statutory time limits in § 13-919; thus, substantial compliance does not apply in this case.

[4] We similarly find no relief for the Gards under the continuing tort theory. The Gards' complaint alleged that the City was negligent in failing to provide a barrier at the intersection. It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action. *Alston v. Hormel Foods Corp., 273 Neb. 422, 730 N.W.2d 376 (2007)*. This "continuing tort doctrine" requires that a tortious act--not simply the continuing ill effects of prior tortious acts--fall within the limitation period. *Id.* The Gards argue that because the unsafe conditions at the intersection have not changed, the wrong continues and a claim is accruing every day. However, the necessary tortious act cannot merely be the failure to right a wrong committed outside the statute of limitations,

because if it were, the statute of limitations would never run because a tort-feasor can undo all or part of the harm. See *id.* We do not view the City's alleged breach of a duty to erect a barrier each day as a continuing unlawful act; instead, it would be more akin to a failure to right a wrong the Gards became aware of in October 2006--which is outside the statute of limitations. We observe that no Nebraska case law has applied the doctrine to claims brought under the Act, and we decline to do so in this case.

[5,6] The Gards additionally argue that equitable estoppel should apply and that ending their case on a statute of limitations ground due to a delay in the filing of their claim would cause a manifest injustice.

An equitable estoppel rests largely on the facts and circumstances of the particular case. *Keene v. Teten, 8 Neb. App. 819, 602 N.W.?d 29 (1999).* The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. *Lowe v. Lancaster Cty. Sch. Dist. 0001, 17 Neb. App. 419, 766 N.W.2d 408 (2009).* In such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Id.* Equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Victory Lake Marine v. Velduis, 9 Neb. App. 815, 621 N.W.2d 306 (2000).* In the case before us, although the Gards assert equitable estoppel in avoidance of the statute of limitations rather than as an affirm-

ative defense, the same rule applies in this context. The Gards' pleadings do not sufficiently allege equitable estoppel. See, generally, *Bohl v. Buffalo Cty., 251 Neb. 492, 557 N.W.2d 668 (1997); Woodard v. City of Lincoln, 7 Neb. App. 11, 578 N.W.2d 892 (1998), affirmed in part and in part reversed and remanded on other grounds 256 Neb. 61, 588 N.W.2d 831 (1999). Cf. Greer v. Chelewski, 162 Neb. 450, 76 N.W.2d 438 (1956)* (stating that party entitled to estoppel need not in all cases formally plead estoppel; if facts constituting estoppel are in any way sufficiently pleaded, party is entitled to benefit of law arising therefrom).

[7] Even if the Gards had adequately pleaded equitable estoppel, they cannot establish the elements for estoppel. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3)knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Lowe, supra.*

[8] The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Woodard v. City of Lincoln, 256 Neb. 61, 588 N.W.2d 831(1999).* Here, however, the City has never indicated that it may erect a barrier. As early as October 30, 2006, Owen informed the Gards in writing that "placing any kind of a guardrail there would violate several Federal Standards that [the City] must follow" and that "[g]uardrails are specifically not to be used to protect private property abutting the roadway." Because one of the essential elements of equitable estoppel has not been satisfied, it does not apply in this case.

To summarize, we conclude that the Gards' claim was not timely filed and that their suit is barred based upon the time limits contained in § 13-919(1). We reject each of the theories they have asserted in an attempt to excuse the untimeliness of their filings.

Additional Evidence.

Finally, the Gards argue that the district court erred in granting summary judgment while evidence was still being received under their motion to compel, which the district court had sustained. They assert in their brief that they received docu-

ments from the City on approximately October 8 and November 23 and 25, 2009. These documents, however, are not in the record. The Gards further discuss a telephone call that they made to the court, but, again, our record contains nothing about this telephone call. More important though, the Gards admit that the final order disposed of the merits of their case on a statute of limitations defense. This additional evidence could not have affected the time of the filing of their claim or the time that they could have known that they had a claim, i.e., after the first accident on October 21, 2006. Accordingly, we find no error.

CONCLUSION

We conclude that the district court properly entered summary judgment in favor of the City, because the Gards did not meet the time requirements set forth in §13-919(1) and the doctrines of continuing tort and equitable estoppel do not excuse their failure to file their lawsuit before the statute of limitations had expired.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CLINTON GARD and PATRICIA GARD, Plaintiffs,	)	DOC. 1093 NO. 293
	)	ORDER
vs	)	
CITY OF OMAHA, Defendant.	)	

On the 24 day of September, 2009 defendant's motion for summary judgment was called up for hearing. The plaintiffs appeared pro se. The defendant appeared by assistant city attorney Alan M. Thelen. Evidence was adduced. The court now finds and orders as follows:

On March 13, 2009, the plaintiffs filed their complaint and stated certain facts which are beyond dispute. Among those facts are that plaintiffs' property is located at 931 North 121 Street, Omaha, Nebraska, which is located at the top or end point of a T intersection of Miracle Hills Drive and 120 Street. This case involves the defendant's decision to expand the westbound lanes from three to four westbound lanes. On October 21, 2006 the reconfiguration of the intersection had been completed and the westbound lanes consisted of two left-hand turn lanes to head southbound on 120 Street, and two right-hand lanes directed to head

northbound, on 120th Street. On October 21, 2006, the plaintiffs allege that a drunk driver westbound on Miracle Hills Drive failed to turn right onto 120 Street and proceeded through the intersection onto plaintiffs' property, "through an existing tree line, a small retaining wall, and eventually colliding with the plaintiffs' house, causing damage to plaintiffs' backyard, landscaping, and home." (Complaint #5). Thereafter the plaintiffs contacted the City of Omaha seeking relief from "errant traffic". (Complaint #12). On April 24, 2007, two vehicles, both westbound on Miracle Hills Drive, drove through the intersection and onto plaintiffs' property causing damage to the property. The plaintiffs again contacted the City of Omaha seeking relief but the defendant declined to grant it.

Plaintiffs' complaint asserts that. they filed a claim against the City under. the Political Tort Claims Act on or about April 23, 2008. (The City Council approved the construction of the turning lane improvements at the T intersection by Resolution #23, dated January 9, 2001.) (exhibit 1).

Plaintiffs' remedy in this case is subject to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §13-901, et seq., §13-905 mandates that "All tort claims brought under the Act shall be filed with the Clerk, Secretary, or other official whose duty it is to maintain the official records of the political subdivision . . . All claims shall be in writ-

ing and shall set forth a time and place of the occurrence giving rise to the claim. . . "

§13-919(1) states in pertinent part,

> Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the Act shall be forever barred unless begun within two years after such claim accrued. The time to begin a suit shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim, or from the date of withdrawal of the claim from the governing body. . . if the time to begin suit would otherwise expire before the end of such period.

On September 16, 2008, the City of Omaha through its law department denied plaintiffs' claim (exhibit 15). The plaintiffs assert that §13-19(3) resolves the issue in their favor. It states,

> If a claim is made or a suit is begun under the Act and a determination is made by the political subdivision or the court that the claim or suit is not permitted under the Act for any other reason than lapse of time, the time to make a claim or to begin a suit under any other appli-

> cable law of this state shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim or begin the suit under such other law would otherwise expire before the end of such period.

Plaintiffs' reliance on subparagraph 3 is misplaced. Although plaintiffs are correct that they filed the lawsuit within six months after disposition of the claim by the defendant, they did not comply with subparagraph I of §13-19(1). The plaintiffs did not bring their claim in writing to the City of Omaha within one year after the claim accrued. The claim accrued on October 21, 2006 at which time the plaintiffs became aware of the problem and shortly thereafter began addressing it with officials of the City of Omaha. The claim was not made pursuant to statute for a period of 18 months. Further, if the suit were permitted by the Act, the plaintiffs would have only "within two years after such claim accrued" to make their claim. As above stated, the lawsuit herein was filed March 13, 2009, well in excess of the two year statute of limitations. The sections of 13-919 must be read together in order to make sense of all of them. Subsection (3) does not come into play unless the criteria stated in subsection (1) have been met, and they were not.

Plaintiffs' claims are outside of the statute of limitations under the Political Subdivisions Tort

Claims Act. Plaintiffs' failure to file within the prescribed statutory limits is jurisdictional. As a result, the court is without subject matter jurisdiction. Accordingly, there are no genuine issues of any material fact and defendant is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

Defendant's motion for summary judgment is granted.

Plaintiffs' complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

Dated: November 30, 2009

BY THE COURT:

J. Patrick Mullen

District Judge

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS OFFICE
OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
September 1, 2010

Clinton Gard
931 N 121 Street
Omaha, NE 68154

IN CASE OF: A-09-001266, Gard v. City of Omaha

The following internal procedural submission or filing by a party:

Appellant/Motion for Rehearing & Brf submitted or filed 08/10/10 has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, future requests for brief date extensions will be closely scrutinized. See Neb. Ct. R. App. P. 2-106(F) and 2-

109(A). Pursuant to Neb. Ct. R. App. P. 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED

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NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS OFFICE
OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
November 10, 2010

Clinton Gard
931 N 121 Street
Omaha, NE 68154

IN CASE OF: A-09-001266, Gard v. City of Omaha

The following internal procedural submission or filing by a party:

Pet Appellants for Further Review & Brf submitted or filed 09/29/10 has been reviewed by the court and the following order entered:

Petition for further review denied.

Respectfully, CLERK OF THE SUPREME COURT AND COURT OF APPEALS

IMPORTANT NOTICE

Due to the reduced number of cases awaiting submission to the Supreme Court and Court of Appeals, and as part of the courts' continuing efforts to reduce case-processing time, future requests for brief date extensions will be closely scrutinized. See Neb. Ct. R. App. P. 2-106(F) and 2-109(A). Pursuant to Neb. Ct. R. App. P. 2-110(A), if an appellant's default for failure to file briefs is issued, appellant "is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief in response to the notice of default subjects the appeal to dismissal."

PLEASE BE ADVISED THAT THESE RULES WILL BE STRICTLY ENFORCED

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DOCKET SHEET

Case # A 09 1266
Case Name Gard v. City of Omaha

INITIAL CASE DATA

Trial Court	DC	Douglas County District Court
Originating Court	DC	Douglas County District Court
Trial Court #		1093-293
Trial Judge	DJ	J. Patrick Mullen
Appeal		12/21/09
Praecipe-B/E		Yes

Description Law – non advanced

ATTORNEYS	CASE CAPTION
Clinton Gard 931 N 121 St Omaha NE 68154 402-342-3150	1)Clinton Gard Appellant
Patricia Gard 931 N 121 St Omaha NE 68154 402-342-3150	2)Patricia Gard
Rosemarie R. Horvath A 22529 3 Alan M. Thelen A 17811 OMAHA CITY ATTORNEY 804 Civic Center 1819 Farnam Street Omaha NE 68183-3815 402-444-5115	3) City of Omaha, Appellee

BRIEF INFORMATION

03-03-10	Brief of Appellant-Gard (Pty 1 & 2) Party #1 Pages 22
04-08-10	Brief of Appellee-City of Omaha Party #3 Pages 31
04-22-10	Reply Brief Party #1 Pages 21

EXTENSIONS OF BRIEF DAY

03-08-10	Appellant Initial Brief Date
03-08-10	Mot. Of Appellee Ext. Brf. Dt.
03-10-10	* Objections Filed
03-08-10	** Motion Considered. By order of the Court, FINAL brief date extended to April 9, 2010.

No further extensions will be allowed except upon a showing of good cause. Neither the stipulation of the parties nor the press of other business constitutes good cause. See Neb. Ct. R. App. P. 2-106(F)(2).

PETITIONS TO BYPASS

COURT RECORD

01-15-10	Transcript
01-19-10	Notice of Filing Bill of Exceptions
04-15-10	002 B/E Bound Volume Exhibits
04-15-10	001 B/E Test -23 pages
12-09-10	Receipt of CDC for returned record

MISCELLANEOUS ENTRIES

06-02-10	Applt Ltr re Audio Tape/Brf Obj S/Judgmt
11-16-10	Applt Motion Stay Mandate
11-19-10	**Overruled.
11-18-10	Applt. Mot. For reinstatement of appeal
11-19-10	**Overruled.
11-22-10	Aplt Mot Reconsider PFR/Stay Mandate-FAX
11-24-10	**Overruled. Mandate to issue forthwith.

SUBMISSION AND DISPOSITION OF APPEAL –
Court of Appeals

06-18-10	Submission to Court
06-18-10	Inbody, Moore, Cassel
08-03-10	**Affirmed. Cassel, Judge Inbody, Chief Judge participating on briefs. (P)
CITE:	0018 Neb App. 0504
08-10-10	Appellant/Motion for Rehearing/Brf
08-19-10	Response to Motion for Rehearing
08-20-10	Inbody, Moore, Cassel
09-01-10	**Motion of appellant for rehearing overruled.

SUBMISSION AND DISPOSITION OF APPEAL –
Supreme Court

09-29-10	Pet Appellants for Further Review & Brf
10-07-10	* Response to Petition for Further Review
10-07-10	Heavican, Wright, Connolly, Gerrard, Stephan, Mccormack, Miller-Lehman
11-10-10	* * Petition for Further Review Denied
11-24-10	MANDATE ISSUED

PROVISIONS, STATUTES, ORDINANCES

FRCP RULE 37 (A) For Not Obeying a Discovery Order.

If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37 (A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discov-

ery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or(iii) other circumstances make an award of expenses unjust.

FRCP RULE 54 Summary Judgment

Rule 56. Summary Judgment (a) BY A CLAIMING PARTY. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.(b) BY A DEFENDING PARTY. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim. (c) TIME FOR A MOTION, RESPONSE, AND REPLY; PROCEEDINGS.(1) These times apply unless a different time is set by local rule or the court orders otherwise:(A) a party may move for summary judgment at anytime until 30 days after the close of all discovery;(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings ,the discovery and disclosure
materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
(g) AFFIDAVIT SUBMITTED IN BAD FAITH. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007;
Mar. 26, 2009, eff. Dec. 1, 2009.)

Nebr. Supreme Court Rules §6-1110. Form of pleadings.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Nebr Rev. Statute §13-919 (3)

If a claim is made or a suit is begun under the act and a determination is made by the political subdivision or by the court that the claim or suit is

not permitted under the act for any other reason than lapse of time, the time to make a claim or to begin a suit under any other applicable law of this state shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim or begin the suit under such other law would otherwise expire before the end of such period.

Omaha Mun. (Code 1980, Sec. 26-28.) When petition required.

Except as otherwise specified and provided in sections 26-25 and 26-26 or elsewhere in this chapter, the public works director or the city council shall not order or cause to be any improvement district except upon a petition of the record owners of a majority of the foot frontage of taxable property in the district abutting upon the streets or parts of streets proposed to be improved.

Omaha Mun. (Code 1980, §26-59) State law references: Similar provisions, R.R.S. 1943, §14-3, 119. Sec. 26-59. Examination of petition.

It shall be the duty of the city clerk, within two days after the filing in the clerk's office of any petition for an improvement in any improvement district, to deliver to the city attorney and to the public works director each a certified copy of the pe-

tition. It shall thereupon be the duty of the city attorney to examine the petition. If the petition and the signatures thereon are in due form of law and the requisite frontage feet of taxable property within the district are legally signed for by the record owners thereof upon the petition, the clerk shall so certify to the city council. It shall also be the duty of the public works director to examine the petition. If the requisite frontage feet of taxable property within the district are signed for, the clerk shall certify to the city council the total frontage feet of taxable property within the district and whether or not the frontage feet of taxable property signed for upon the petition is correctly stated, and the clerk shall attach to and make part of such certificate a plat of the improvement district. Such certificate, when filed in the office of the city clerk, shall be prima facie evidence of the truth and correctness of the matter therein certified. If it appears to the city attorney or the public works director that the petition for any improvement is irregular, illegal or insufficient, the public works director shall notify the petitioners of such irregularity, illegality, or insufficiency, and the property owners within such district may at any time file supplemental petitions for such improvement and such supplemental petitions shall be considered and taken as a part of the original petition. Certified copies of such supplemental petitions shall be delivered to the city attorney and public works director for their examination and certification as in the case of the original petition.

Omaha Mun. (Code 1980, § 26-60) State law references: Similar provisions, R.R.S. 1943, § 14-3, 120. Sec. 26-60. Publication of notice.

If the certificates of the city attorney and public works director show that the petition is regular, legal and sufficient, the city council shall by resolution direct the city clerk to cause a copy of the petition to be published for three days in the official newspaper of the city, with a notice thereto attached directing the property owners generally in the district that they shall have 30 days from the first day of publication of the petition and notice to file a protest in the office of the city clerk against the regularity or the sufficiency of the petition or signatures thereon.

Omaha Code 1980, §18-2 Sec. 18-2, 18-4,18-5

For the purposes of this chapter, a nuisance exists when a person fails to perform a duty or permits any condition or thing to exist, which act, omission, condition or thing either:

(a) Injures or endangers the comfort, repose, health or safety of others;

(b) Offends decency;

(c) Is offensive to the senses;

(d) Unlawfully interferes with, obstructs or tends to obstruct or renders dangerous for passage any public or private street, alley, highway, sidewalk, stream, ditch or drainage;

(e) In any way renders other persons insecure in life or the use of property; or

(f) Essentially interferes with the quiet enjoyment of life and property, or tends to depreciate the value of the property of others.

Omaha City (Code 1980, § 18-4) Sec. 18-4. Prohibited.

It shall be unlawful for any person to cause, permit, maintain or allow the creation of a nuisance. *(Code 1980, § 18-5)*

Partial Transcript from the hearing on September 29, 2009 before the Douglas County, NE Court on Defendant's Motion for Summary Judgment and Plaintiffs Motion to Compel Discovery (from Bill of Exceptions Volume I, pages 12 through 22)

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of your motion?

MS. HORVATH: If I might, Your Honor, just to encapsulate. But I would offer no other exhibits,

just argument.

THE COURT: I'm not hearing you.

MS. HORVATH: I would offer nothing further

than just argument. So I'm done with the exhibits.

THE COURT: And I'm going to take this

matter under advisement today, but I would appreciate if

you could submit an order that generally follows your

argument insofar as it's supported by the evidence for

my consideration, I'd appreciate that.

MS. HORVATH: I will, Your Honor.

THE COURT: Thank you. Mr. Gard, Mrs. Gard, anything you wish to say in regard to this matter?

MS. GARD: Your Honor, have you read all of our brief and looked at our exhibits?

THE COURT: I've read it. I'm going to read it again more carefully. I've gone over all the material once but it's voluminous enough that I'm going to have to look at it again. But I appreciate and understand the nature of what's occurred. I get it. But if you — if there's anything that you want to highlight or tell me about that, I'm listening.

MR. GARD: Well, I guess the only thing I

would say is our neighbor has several kids, two boys, my boy, they get together at times and play. You can see them on the pictures there. I had a tackling dummy up

there for them to use in that -- the backyard, all that had to go away because I don't want anybody to get run over in our backyard.

THE COURT: Yeah. I've seen the pictures that you've submitted previously and --

MR. GARD: Thank you, Your Honor.

THE COURT: And I understand what you're facing.

If there's nothing more, I'll take the matter under advisement and- - you know, I'll tell you the problem is that, you know, the dates that the statutes set for the different —— for complaints and notification of the City and so forth oftentimes are jurisdictional.

If you don't meet those you can just be out of luck as far as this case is concerned. But there are exceptions, and I want to look at it more carefully and see if you can overcome this hurdle that the - - that's before you today.

Go I'll take it under advisement, I'll give it a closer look, and I'll get you a written order as soon as I can.

MR. GARD: Thank you, Your Honor

THE COURT: We're adjourned, parties are excused.

MS. HORVATH: Thank you, Your Honor. Are we not having the additional motion?

MS. GARD: The motion to Compel Discovery

THE COURT: I sorry, I thought that was it.

MS. GARD: Your Honor, may I ask a question about the previous motion?

THE COURT: Yes. Yes.

MS. GARD: I cited a Nebraska statute in the brief that was cut off when I reformatted to do double spacing. Can I make a correction and tell you what statute, because the statute is the one that what -- that concerns the exception to the time, the six-month

extension?

THE COURT: Sure. Can you -- is it a part of the exhibits or brief or --

MS. GARD: Yes, it --

THE COURT: Tell me where I find t. If you just want to recite the statute for me I can look for myself, either way.

MS. GARD: It will be on page 12 of the brief.

THE COURT: Just a second.

All right. I have page 12.

MS. GARD: At the bottom there it starts in bold, "Therefore, the following applies".

THE COURT: Yes.

MS. GARD: I'm citing revised statute 13—919 and it's paragraph 3. I cut off the statute number.

"If a claim is made or a suit is- begun under the act and a determination is made by the political subdivision or by the court that the claim or suit is not permitted

under the act for any other reason than lapse of time,
the time to make a claim or to begin a suit under any
other applicable law of this state shall be extended for
a period of six months from the date of the court order
making such determination or the date of mailing of
notice to the claimant of such determination".

THE COURT: And you said that's 13—919,
subdivision paragraph --
MS. GARD 3.
THE COURT: -- 3. All right.
Just a second.
Okay. Anything else regarding that?
MS. GARD: No, Your Honor, Thank you.
THE COURT: The Motion to Compel?
If you wish to be heard, you may.
MS. GARD: Patricia Gard, Plaintiff, claim

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ing negligence on the part of City of Omaha for damages

to our property caused by conditions at the intersection of Miracle Hills Drive and 120th Street. We filed this Motion to Compel Discovery to attempt to obtain information pertaining to the actual construction of improvements, including the start and completion dates. This information is relevant to establish a time line of events related to our case which may lead to admitted evidence.

Your Honor, we attempted to obtain this on the first request for production of records.

THE COURT: I can't hear you.

MS. GARD: We made an attempt, two attempts to obtain this information, one was with a written request for first production of records, and then the second time was verbally at the City of Omaha Law Offices prior to our deposition.

THE COURT: Okay. Would the City like to be heard?

MS. HORVATH: Yes, Your Honor. Your Honor, I have an exhibit of Tim O'Bryan who is our professional engineer from public works, in response to the Motion to Compel.

THE COURT: Okay.

(Exhibit No. 19 marked for identification.)

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THE COURT: Do you have a copy for them?

MS. HORVATH: Unfortunately not.

THE COURT: Why don't you take a minute, we have a copy machine right through that door, and you can make a copy.

(Recess taken.)

MS. HORVATH: May I approach, Your Honor?

THE COURT: Yes.

MS. HORVATH: This is the affidavit of Tim

O'Bryan which responds to the question of where is this —- the public works file -— or the construction file, rather, on the Miracle Hills project.

THE COURT: It doesn't say in the affidavit, but what is the City's standard practice in regard to maintaining such information?

MS. HORVATH: The City keeps records, I believe it's for five years. This was an actual construction file held by the inspector, so it went into a storage area, and then when Mr. O'Bryan went to go locate the file, the public works file, he couldn't find it. From —— based on the other information for getting finance and counsel records we've provided everything else which we can, which is the Council resolution showing the plans, as well as any finance records which

show when we made the subdivision contractors and
contractor, that we provided, and he also indicated
to his best belief after looking at all those documents
when the project started, when it finished, when we made
the last payment to the contractor, and then I believe
there was some landscaping issues that remained several
months after we substantially completed. the project.
Now, the City has no problem if the Gards would like to
depose Mr. O'Bryan. This affidavit was in lieu
hopefully, this is what they would like, the
information, but we can — they can sure depose
Mr. O'Bryan or anyone else at the City.
THE COURT: The Gards made their first
complaint to the City when? When is that?
Mr. or Mrs. Gard, when was your first complaint

or notice to the City?

MS. GARD: It would have been immediately after the first accident in October of 2006.

THE COURT: So four years after completion they made a complaint to the City about this intersection. Is there some chance that this -- these documents might have been misplaced or placed elsewhere?

MS. HORVATH: That's -- Mr. Thelen, who is the Deputy City Attorney, also looked and he had

met with the Gards, and that our concern, it an actual – it's not one of our legal files, this is an actual construction and inspector' s file that's misplaced, it s not in the storage area where we normally keep construction inspectors' files and diaries.

THE COURT: And the file hasn been reproduced and placed on computer software or anything

such as that?

MS. HORVATH: No, the construction inspectors literally write in an orange diary, in a small, little orange diary, and that's unless we have a need to we usually never transpose that. it's just kept in a diary, daily activities on the site, construction issues, that's the file that we can't locate.

THE COURT: I mean, so what does Mr. O'Bryan -— well, what does he say about this? I mean, this is a substantial loss, obviously, at least in regard to this project when a complaint's made within five years regarding the project, you'd think that material would be retained.

MS. HORVATH: I mean, other than he's looked for it, we looked, went to finance to — hopefully they had something that we could piece

together, because normally finance will have weekly reports, payment to contractors, you know, trying to piece together the items we had from City Council resolution.

THE COURT; Mr. and Mrs. Gard, the affidavit of O"Bryan has been offered, any objection to its being received by the Court?

MS. GARD: Yes. I feel we should be we should object to it because I think that it - there's discrepancies to what we've — we feel the correct date would be. The construction of the improvements, to our knowledge, or to the best of my knowledge, is -- was completed much later than the rest of the improvements along Miracle Hills Drive. It was completed within probably two to three days.

THE COURT: I think he's got a right to

testify by his affidavit as to the facts contained
therein and so I'm going to overrule your objection
and receive it into evidence
(Exhibit No. 19 is hereby made a part of this
Bill of Exceptions and may be found in
Volume II.)

THE COURT: That doesn't mean that I'm

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saving that it's accurate, but I think he's got a
right to testify to the material contained therein
and, again ----- well, we'll just have to go from there -
Certainly the request is a reasonable one, that if the
City has in its possession that should be delivered
over, so I'll state that for the record, it s an ongoing
obligation to give this material to the Gards and --

your motion is lengthy and I'm not sure if we this covers generally everything that you're talking about in your motion.

MS. GARD: Yes, Your Honor, everything in the motion was — all the points were centered around what we had received. We've received substantial documentation from the City and we were --we went through a three-plus hour deposition where the actual dates of the start and finish of the construction were never mentioned or asked. That was the — that's the brunt of what my points were, so, yes, everything centers around that, Your Honor.

THE COURT: And what are you saying the correct dates were or are?

MS. GARD: I can't state with accuracy. do believe it was — they were the last improvements to be done.

MR. GARD: And it was much later after the

completion of the rest of that project.

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2 THE COURT: Okay, well, I'm concerned about

3 it too, I don know what the remedy is, exactly, if

4 they say they don't have it. I will direct that they

5 take a second look.

6 MS. HORVATH: Sure, of course.

7 THE COURT: And second's probably the wrong

8 word because I'm sure you've looked, but, please, let

9 them know you are directed by the Court to turn over

10 everything you can to find these documents. It just

11 leaves a bad taste in people's mouth when you can't come

12 up with those type of records on an issue that's quite

13 dear to them.

14 So does that complete the hearings for this

15 morning?

16 MS. HORVATH: It does, Your Honor.

17 MS. GARD: Yes, Your Honor.

MR. GARD: Yes, Your Honor.

MS. HORVATH: Yes, Your Honor.

THE COURT; So the Motion to Comp is sustained and the City is directed to supply those records if found.

And the other matter is taken under advisement.

We're adjourned. You're excused for today.

MS. GARD: Thank you, Your Honor.

MS. HORVATH: Thank you, Your Honor.

MR. GARD: Thank you, Your Honor.

(Hearing concluded at the hour of 9:15 a.m.)

THE NEBRASKA COURT OF APPEALS

GARD	)	
	)	
	)	
Appellants	)	**Case No. A-09-001266**
	)	
	)	
	)	**EMERGENCY**
v.	)	**MOTION FOR**
	)	**REINSTATEMENT**
	)	**OF APPEAL**
CITY OF OMAHA	)	
	)	
	)	
	)	
Appellee	)	

COME NOW Plaintiffs Clinton and Patricia Gard and respectfully move this court to grant a motion for reinstatement of the appeal of the above captioned case.

Plaintiffs have now discovered relevant decisions in previous litigation in connection with the Development Agreement that included the Petition for Street Improvements known as Resolution 23, the written documents and audiotape hearing already being part of the record, and referenced within Plaintiffs pleadings, briefs,

exhibits, and oral argument before the Nebraska Court of Appeals. (E11:1-17) (T323-334) (T336 audiotape)

RE: Waite vs. City of Omaha, Douglas County District Court 1001-116 Nebraska Supreme Court S01-193 (See Attachment)

This case is relevant because the issues within this case are directly tied to issues and facts within Gard vs. City of Omaha, now before the Nebraska Court of Appeals that recently affirmed judgment of the Douglas County District Court. *Waite vs. City of Omaha* also originated in Douglas County District Court. Within *Waite* are decisions and statements by the courts that are relevant to our case and have bearing on whether the City of Omaha is entitled to summary judgment as a matter of law in our case, *Gard vs. City of Omaha*.

As Plaintiffs have discussed within their Motion *for Rehearing* and *Petition for Further Review*, there are several relevant facts on the record in *Gard vs. City of Omaha* that were not addressed by Douglas County District Court within its Order, or the Court of Appeals within its Opinion, and now we discover a court case directly tied to these facts that must be brought into the light and examined within our case under the law.

The Supreme Court of Nebraska issued an opinion in *Waite* March 2002. The court decided that the appellate court was without jurisdiction as

the order in Douglas County Court was not a final order. The injunction in question was to prevent ***future*** monetary damages to the Plaintiffs as a result of the vacation of a street within the development agreement. While the temporary injunction was ultimately dissolved for lack of actual damages, the court did not prevent Plaintiffs from pursuing a future permanent injunction, even while stating that Plaintiffs' were not abutting property owners but could still be entitled to special damages. Douglas County District Court put the City of Omaha on notice in 2001 within its order that future damages from abutting property owners would be entitled to a permanent injunction.

This information constitutes an exceptional, compelling reason to reinstate Plaintiffs' appeal immediately, reverse and remand for a new trial, or expedite the moving of the docket to the Nebraska Supreme Court. It appears Plaintiffs may be entitled to an injunction based on the information therein as Plaintiffs are an abutting property to street improvements within the agreement, and have suffered damages.

The Defendant City of Omaha, by reason of the order of the Douglas County District Court (see attached) in the matter of *Waite* was PUT ON NOTICE BY THE COURT IN 2001 that there could possibly be "special damages" from abutting property owners, and thus, this revelation must be considered and applied to *Gard vs. City of Omaha*.

Plaintiffs have now shown that Douglas County District Court put the Defendant, City of Omaha on notice of a possible claim from any abutting property owner regarding this Development Agreement in 2001.

Defendant concealed facts and failed in its statutory duty to warn Plaintiffs or any owner of our abutting property of dangerous conditions , failed in its statutory notice requirements to Plaintiffs as abutting property owners, and therefore cannot avail itself to governmental immunity or a statute of limitations defense. *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000). Muller v. Thaut, 430 N.W. 2d 884, 230 Neb. 244 Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354 Frezell v. Iwersen 436 N.W. 2d 194, 231 Neb. 365. C.A. 8 (Neb.) 1991. Hamilton v. City of Omaha, 243 Neb. 253, 498 N.W.2d 555 (1993). Alston v. Hormel Foods Corp., 273 Neb. 422 (2007) Omaha Mun.(Code 1980, § 26-59) Omaha Mun. (Code 1980, § 26-60)*

The street improvements at Miracle Hills Dr. and 120th Sts., that led to physical damages, loss of property value and enjoyment of property in *Gard vs. City Omaha* originate and are a part of the same development agreement within Resolution 23, and the Supreme Court of Nebraska denied our petition for further review on November 10, 2010, even while Plaintiffs have already shown on the record that the City of Omaha had prior knowledge of dangerous conditions and failed in their non-

discretionary duty to warn; and failed in statutory notice requirements to any owner of **our property, an abutting property to improvements within this same agreement**

Plaintiffs are confident that the granting of this motion will lead to the reverse and remand of the decision of the Douglas County District Court in Gard vs. City of Omaha or the moving of this case to the docket of the Nebraska Supreme Court. **Plaintiffs respectfully but urgently move this court to grant this motion to prevent any injustice or future damages occurring as a result of improper summary judgment.**

/s/ Clinton Gard
/s/ Patricia Gard
Appellants
931 N 121 St.
Omaha, NE 68154
(402) 342-3150

CERTIFICATE OF SERVICE

We certify that a true and correct copy of the foregoing Motion to Reinstate Appeal has been sent by the undersigned by fax transmission on this 18th day of November, 2010 to the City of Omaha, c/o Deputy City Attorneys Alan Thelen/Rose Marie Horvath, 804 Omaha/ Douglas Civic Center, 1819 Farnam St.,Omaha,Nebraska88183
/s/ Clinton Gard
/s/ Patricia Gard
Plaintiffs/Appellants

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

ROLAND F. WAITE and	)	Doc. 1001
FRANK KRECJI,	)	No. 116
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
CITY OF OMAHA, MAYOR	)	
HAL DAUB BUSTER BROWN,	)	
LORMONG L LO, FRANK D.	)	
BROWN, ROBERT J. SIVICK,	)	
PAUL Q. KONECK, CLIFF L	)	
HERD, JAMES H. MONAHAN,	)	
and MARC G. KRAFT,	)	
Defendants.	)	

This matter came before the Court pursuant to the motion of Plaintiffs, Roland F. Waite ("Waite") and Frank Krecji ("Krecji), for a temporary injunction in an action filed January 12, 2001, against Defendants, City of Omaha ("City"), City Clerk Buster Brown ("Brown"), Mayor Hal Daub ("Mayor"), and the Omaha City Council ("City Council").

Waite and Krecji seek to enjoin the City from the following: (1) vacating a portion of 117 Street near their properties; (2) enforcing the vacation ordinance passed by the City Council; and (3) spending funds pursuant to a Development Agreement between West Corporation ("West Corp."), the City, and others relating to street and intersection improvements in the vicinity of the vacated street. On January 12, 2001 this Court signed an ex parte Restraining Order. Subsequently, a hearing was held on January 22, 2001, on Plaintiffs' Motion for Temporary Injunction. Robert Hamer appeared on behalf of the City of Omaha. James D. Sherrets and Michael Kennedy appeared on behalf of Waite and Krecji. Exhibits were presented and received into evidence. Evidence was adduced. The parties submitted post-hearing briefs[1] on January 29, 2001. Upon review of the arguments and authorities which were ably presented by counsel, the Court finds as follows:

STATEMENT OF FACTS

In the mid-1980's, both Plaintiffs separately purchased lots in the Miracle Hills Park development, which abut the western edge of said development on Nicholas Street, in the vicinity to the portion of 117 Street to be vacated. According the subdivision's plat, 117 Street runs directly into Nicholas Street; apparently unfettered from any stop sign or

[1]The Plaintiffs submitted a second "Reply Brief in Support of Injunction" on January 31,2001, which the Court has also reviewed.

other traffic control device. When the Plaintiffs made their purchase of said properties, they allegedly relied upon the subdivision's plat that called for street access to their properties from Miracle Hills Drive at 117 Street and Nicholas Street

In 1997, West Corp. acquired property in the Miracle Hills subdivision, which consists of two lots that are separated by 117 Street. In the fall of 2000, West Corp. sought to vacate 117 Street between Miracle Hills Drive and Nicholas Street for the purpose of adjoining both lots in order to build more office space. Subsequently, West Corp. filed a petition with the City Council requesting that the portion of 117 Street between Miracle Hills Drive and Nicholas Street be vacated. On January 9, 2001, the City Council passed an ordinance permitting the said portion of 117 Street to be vacated, as well as a resolution approving a Development Agreement. Both the said ordinance and resolution were voted on at the same time. Plaintiffs' representative appeared at the City Council meeting.

DISCUSSION AND CONCLUSIONS OF LAW

The Nebraska Supreme Court has held that a temporary injunction should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. Central States Foundation v. Balka 256 Neb. 369, 378, 590 NW.2d 832, 838-39

(1999); State v. World Diversified, Inc. 254 Neb. 307,576 N.W.2d 198 (1998); Neb. Rev. Stat. §25-1063 (Reissue 1997).

Further, a party seeking an injunction must establish by competent evidence, every fact necessary to entitle him to relief. Cather & Sons Construction. Inc. v. City of Lincoln 200 Neb. 510,264 N.W.2d 413(1978) (Cather I).

The primary question in this case is, whether Plaintiffs are entitled to a temporary injunction prohibiting the City of Omaha from closing 117 Street. The general rule in Nebraska is that a property owner whose property does not abut upon a portion of the street to be vacated has no right of action to restrain the vacation unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public. Id. at 519, 264 N.W.2d at 419; Feldman v. City of Omaha 184 Neb. 226, 228, 166 N.W.2d 421, 423 (1969); Hanson v. City of Omaha 157 Neb. 403,417,59 N.W.2d 622,629(1953).

In this case, the City maintains that Plaintiffs are not abutting property owners because their property does not touch the portion of the street to be vacated and that the evidence does not establish that Plaintiffs have suffered special damages. On the other hand, Plaintiffs contend that the western portion of Nicholas Street and 117 Street are one continuous street and that, therefore, their property abuts a portion of the street to be vacated. Plaintiffs also contend that they will suffer special

damages as a result of the vacation. Waite testified that the value of his property will decrease, that his rental income will be reduced, and that he will have a higher vacancy in his building as a result of the closing of 117 Street. Scott Moore, the leasing agent for the Plaintiffs' properties on Nicholas Street, testified that the closing of 117 Street will have a negative impact on the leasing of the buildings and a negative impact on a sale of the buildings. Krejci testified similarly in his Affidavit (Ex. 2).

The Court agrees with the City's position that the Plaintiffs are not abutting property owners within the meaning of Nebraska law. Notwithstanding the odd configuration of the eastern and western portions of Nicholas Street between its two intersections with Miracle Hills Drive, the Court finds that 117 Street between Miracle Hills Drive and Nicholas Street is a street separate from Nicholas Street, contrary to Plaintiffs' argument. Nicholas Street and 117 Street were platted as separate streets (Ex. 12). Accordingly, the Court finds that no portion of the boundary of the Plaintiffs' property previously available for ingress or egress to or from the proposed vacated street is in common with the property line of 117 Street. See, City of Lincoln v. Cather & Sons Construction. Inc. 206 Neb. 10,290 N.W.2d 798(1980) (Cather II).

However, in Nebraska, a property owner whose property does not abut upon the street, which is proposed to be vacated, may still have a right of action if he suffers a special or peculiar damage dif-

fering in kind from that of the general public. Cather I at 519-520, 264 N.W.2d at 419; Hanson at 417, 59 N.W.2d at 629. It is not necessary for the Court to decide at this time the close question of whether the Plaintiffs will suffer special damage. Even assuming, without deciding, that Plaintiffs will suffer special damage different in kind from that of the general public, it is clear that the Plaintiffs have not shown by a preponderance of the evidence that they are entitled to injunctive relief. The evidence of Plaintiffs' prospective damage is not such that it can be said that their right is clear, their damage irreparable, and in particular that their remedy at law is inadequate to prevent a failure of justice. Id. at 520, 264 N.W.2d at 419 Hanson at 416,59 N.W.2d at 629.

It is well settled in Nebraska that an injury is not irreparable if it is of such a nature that it can be compensated by an award of damages. See Central Nebraska Broadcasting Co., Inc. v. Heartland Radio. Inc. 251 Neb. 912, 560 N.W. 2d 770 (1997). The damages that Plaintiffs claim will result from the vacation of 117 Street are primarily pecuniary.[2] Plaintiffs contend that they will suffer a diminution in the values of their property because the rental/lease income will decrease and a possible sale price will decrease. This loss of value or income or profits is compensable in an action at

[2]Any inconvenience or increased traffic congestion or problems that may result to the Plaintiffs as non-abutting property owners is not compensable as a special or peculiar injury different in kind from that suffered by the public at large. Rossito v. City of Omaha, 199 Neb. 260,258 N.W.2d 126(1977).

law in Nebraska. Id. Further, it cannot be said that the City of Omaha is insolvent. Accordingly, the Court finds and concludes that the Plaintiffs have an adequate remedy at law and therefore are not entitled to a temporary injunction.

Nor are the Plaintiffs entitled to a temporary injunction as taxpayers claiming that the City failed to follow its own charter and ordinances in this case. In Nebraska, the exercise of discretionary power of a municipality to which power has been delegated to vacate streets is not ordinarily subject to judicial review, unless there has been an abuse of discretion, fraud, or glaring informality, or illegality in proceedings, or absence of jurisdiction. Hanson at 416, 59 N.W.2d at 629. Further, the Nebraska Supreme Court has repeatedly held that a court must give "great deference" to a city's determination of which laws should be enacted for the welfare of its citizens. See Giger v. City of Omaha 232 Neb. 676,442 N.W.2d 182(1989).

Plaintiffs argue that the City did not properly enact the vacation ordinance because the petition to vacate was not signed by the owners of 75% of the taxable frontage feet abutting 117 Street and also because the resolution adopting the development agreement was proposed less than a week before it was adopted, and because the ordinance and resolution were adopted by a single vote.

The Court has carefully reviewed this matter and is not persuaded by the Plaintiffs' arguments. Since the Court has determined that 117 Street is a street separate from Nicholas Street, the Plaintiffs' first argument that less than 75% of the abutting landowners signed the petition must fail. The evidence establishes that more than 75% of the abutting landowners of 117 Street signed the petition. Further, since no state statute or city ordinance requires the City of Omaha to propose the resolution approving the development agreement at any specific time before it is considered by the City Council, there was no violation of any law or ordinance by the City Council when it passed the resolution without the formal requirements for the enactment of ordinances. See 56 Am Jur.2d Municipal Corporations §295 at 338 (2000). Similarly, the Court finds no statute or ordinance prohibiting the City Council from considering an ordinance and a related resolution at the same time and passing upon them in a single vote. For these reasons the Court finds and concludes that the action of the City Council enacting the ordinance and resolution in question was not arbitrary or capricious within the meaning of Nebraska law.

For all the reasons discussed above, the Court finds that Plaintiffs have not established by competent evidence every fact necessary to entitle them to injunctive relief.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion for a temporary injunction is overruled and the temporary restrain-

ing order entered in this case is hereby dissolved.

Dated this 31 day of January 2001.

BY THE COURT:

Sandra L. Dougherty
District Court Judge

cc: James Sherrets, Atty for Plaintiffs
Bob Hamer, Assistant City Attorney

Notice of Tort Claim (T4-8)

You are hereby notified pursuant to the requirements of the Political Subdivisions Tort Claims Act 13-901 to 13-927, that Clinton and Patricia Gard (hereinafter referred to as "Claimants"), whose residence is located at 931 N. 121 St., Omaha, NE 68154 (hereinafter referred to as the "Property") intend to take legal action to claim compensation from the City of Omaha for damages in the form of substantial loss of value to Property and loss of quiet enjoyment of Property, resulting from the City's failure to remedy a dangerous condition at the intersection of Miracle Hills Drive and 120th Street, where the t-intersection abuts the east side of Property.

Pursuant to the following is a summary of the facts and circumstances upon which the claim is based. Supporting copies of all correspondence, photos, and reports referred to herein are attached.

Time and Place Loss Occurred
April 24, 2007, 3:52 pm
931 N 121 St., Omaha, NE 68154

Amount of Damages Sought
$45,890.00

Residence of Persons making Claim
931 North 121st Street, Omaha, NE 68154

Claim for Damages

For negligence in failing to take the proper steps to correct the obvious defect at this location where the City of Omaha had actual knowledge and notice of dangerous conditions.

The Extent of the Loss

Injuries include, but are not limited to, depreciation of property value, loss of quiet enjoyment of residence, endangerment of comfort, repose, and safety of any person on the Property with proximity to the Intersection, the rendering of insecurity in the use of the Property.

Demand for Settlement

Clinton and Patricia Gard, 931 N 121 St., Omaha, NE 68154, as Claimants, demand payment in the amount of $45,890.00 (Forty five thousand eight hundred ninety and no/100 dollars)

Breakdown of Settlement:

Average of 3 Comparable Properties Market Value From attached appraisal: $140,466.00

Appraised value of Claimants Property from attached appraisal: - 111,000.00

Loss of Value due to Negative Influence of Intersection, Safety Factors, loss of use of backyard: 29,466.00

Average of 2 estimates from landscape designers to achieve a reasonable level of security and privacy in place on Claimant's property due to City's refusal to remedy the problem on City property.	16,024.00
Costs of Appraisal (350.00) And Landscape Design deposit (50.00)	400.00
	45,890.00

The Circumstances which Brought about the Loss

The Property is located at the top of a t-intersection of Miracle Hills Dr. and 120th St. in Omaha, NE. Miracle Hills Dr. is the only connecting street through the retail/business park. Estimated daily travel is 10,300 daily westbound on Miracle Hills Dr. (see exhibit C). Coming up the hill toward the Property the two lane westbound lanes expand into 4 lanes, 2 turning north on 120th St., and 2 turning south on 120th St. The speed limit is 30mph on Miracle Hills Dr., and traffic is allowed to proceed without stopping into the intersection to make these turns on green lights/arrows.

Claimants purchased this property in January 2001. At the time of purchase there were 3 lanes facing the back of their house. In later 2002-2003 there was business expansion, principally West Corp. expanding their campus which included the *vacation of 117th St., adding traffic signals, and widening Miracle Hills Dr. and 120th to 4 turning lanes to accommodate an **anticipated substantial growth of traffic in the near future. Claimants were unaware of any future plans and would not have anticipated any further expansion of that intersection when they purchased the Property. Additional bars also moved into the retail area of Miracle Hills Park during this time, which resulted in heavier traffic coming towards the Property not only from the day activities in Miracle Hills Park but also late night traffic generated from these night spots.

On Oct. 21, 2006, at approx 1 am a DUI driver proceeded through the t-intersection, crashed through the tree line, proceeded through the yard and struck the house. After hitting trees, a ladder, a small retaining wall, and a chair, the vehicle slowed down enough to avoid major damage to the house. Claimants immediately contacted Omaha Public Works about concerns that this type of accident may happen again as they noticed substantial increases in traffic. From the time of this expansion there was an increase of the number and severity of accidents at this intersection. Omaha Public Works responded in writing stating federal guidelines prohibited any type of barrier at

this location. Claimant's final communication in 2006 with Omaha Public Works ended with a plea to do something before another incident happens. After several weeks waiting for a response, Claimants received a brief email from Harry Owen of Omaha Public Works stating the City would not be putting any form of barrier in at this location.

On April 24, 2007 another accident occurred between 2 vehicles westbound on Miracle Hills Dr. and both vehicles ended up in Property backyard. Claimants contacted Public Works and received no return call from them. Claimants then called the Mayor's office and were again referred us back to Public Works. Claimants again contacted the Mayor's office. In May, 2007, Todd Pfitzer, an engineer from Public Works came out to the intersection and spoke with Claimants about possibilities for changes to prevent, or at least reduce the possibility of another vehicle crashing into the yard. Claimants were, and still are, open to any solution to the problem. Ideas from the flexible cable barriers, a guardrail, and a berm were discussed, with Mr. Pfitzer rejecting every idea. At this point Public Works agreed only to increasing the size of the signs to better indicate the t-intersection. Claimants were not satisfied with this as signs would not deter entry into the yard from an errant vehicle or impaired drivers. The vehicle in the first accident crushed the sign before proceeding into Claimant's backyard and hitting the house. Mr. Pfitzer stated if the inter-

section is changed it will increase the City's liability, the effect of this being that Claimants are being forced to live with the backyard of the Property to be used as a "safety net" for errant vehicles. Claimant's position is that they cannot allow their property to be used for this purpose; they cannot allow a dangerous condition to exist that threatens the safety and enjoyment of their property; they cannot accept their property's value to be diminished by the City's refusal to address this problem and accept responsibility for the design and expansion at this location. This intersection can, by the City's own definition of a *nuisance*, be defined as such with regard to this Property.

In June 2007, Claimants filed a protest with Board of Equalization, asking that the Property value be adjusted due to the negative influence of the intersection. The Board received all documentation, correspondence, and photos. The Board agreed with Claimant's position, but adjusted the value less what was requested, using a statement in a letter from Public Works saying that Federal Guidelines prohibited the city from putting a barrier up. When Claimants found this statement wasn't true, Claimants wrote Public Works and asked them for a written letter correcting this statement. Claimants wanted the BOE to review their tax protest based on the truth. Public Works did not respond, and the BOE told Claimants to call the Mayor's Office. At last contact with the Mayor's Chief of Staff, Claimants were told the City cannot

do anything to help with any of these problems. He said, "We are not traffic engineers, and we cannot force Public Works to make any changes to the intersection."

Claimants responded, "We cannot accept the City using our backyard as their safety net for this intersection to order to avoid liability problems." Claimants also stated, as always, the desire to look at any solution, that Claimants prefer a physical solution to the problem rather than seeking money damages.

After many unsuccessful attempts to get the City of Omaha to respond to the problem, Claimants sought relief outside of the City, and contacted the Federal Highway Administration (hereinafter "FHWA") to confirm that their guidelines prohibited any type of barrier at this location. Claimants were informed that the guidelines do not apply to this intersection. Claimants found that the recent widening project was paid for out of city funds in connection with West Corp.'s expansion (*West Corp. was allowed to hire their own engineering firm and make changes to this intersection to benefit themselves and the City agreed to pay for these changes) and the guidelines, while not laws, only applied to intersections where federal funds were used. The FHWA turned the inquiry over the Nebraska Department of Roads (hereinafter NDOR) safety committee. The issue was on the agenda of the safety committee on June 12, 2007 and July 10, 2007, where they discussed possible solutions. The

FHWA did make a recommendation for a certain type of barrier, but some on the NDOR safety committee voiced concerns about the lack of 90 degree impact testing for this type of barrier. FHWA and NDOR came to the conclusion the intersection was the City's responsibility and had the final call. Once again, Public Works rejected any solution for any type of barrier at this location.

Pointing 4 lanes of traffic that average over 10,000 cars daily at one house with vehicles driving directly at it is excessive, outside of the normal standards of traffic design, especially in the light of 3 vehicles in 7 months time entering the backyard. Claimants feel they have a valid nuisance complaint with 4 lanes of headlights shining into the windows, but headlights pale in comparison to being afraid of more cars driving into the yard. This is a very unusual and non-standard type of intersection given the current volume and its proximity to residential property. There are no other t-intersections with homes to compare this with in Omaha in terms of volume; it may be hard to find anything comparable to it in any city when you consider that the house lies almost directly on the level with four lanes of traffic directly facing it. No relief from this situation effectively takes the backyard away from Claimants perpetually as they no longer feel safe, and have not let any children play in the yard since the second accident. If Claimants sell the house, they will have to disclose the danger that exists and the fact the City has done nothing to remedy

the problem. This substantially affects the current and future value and marketability of the Property.

The negligence of the City of Omaha, Nebraska is a direct and proximate cause of Claimant's loss.

* Resolution #23 **Resolution 23 Hearing Audio copy enclosed

The following exhibits are included and attached to this tort claim:

Exhibit A- Correspondence with Omaha Public Works and the Mayor's Office

Exhibit B- Police Reports/Photos/Insurance Claims

Exhibit C- Correspondence with Federal Highway Administration and Nebraska Department of Roads

Exhibit D- Copy of Resolution #23, Audio Tape of Hearing, Other Related Information

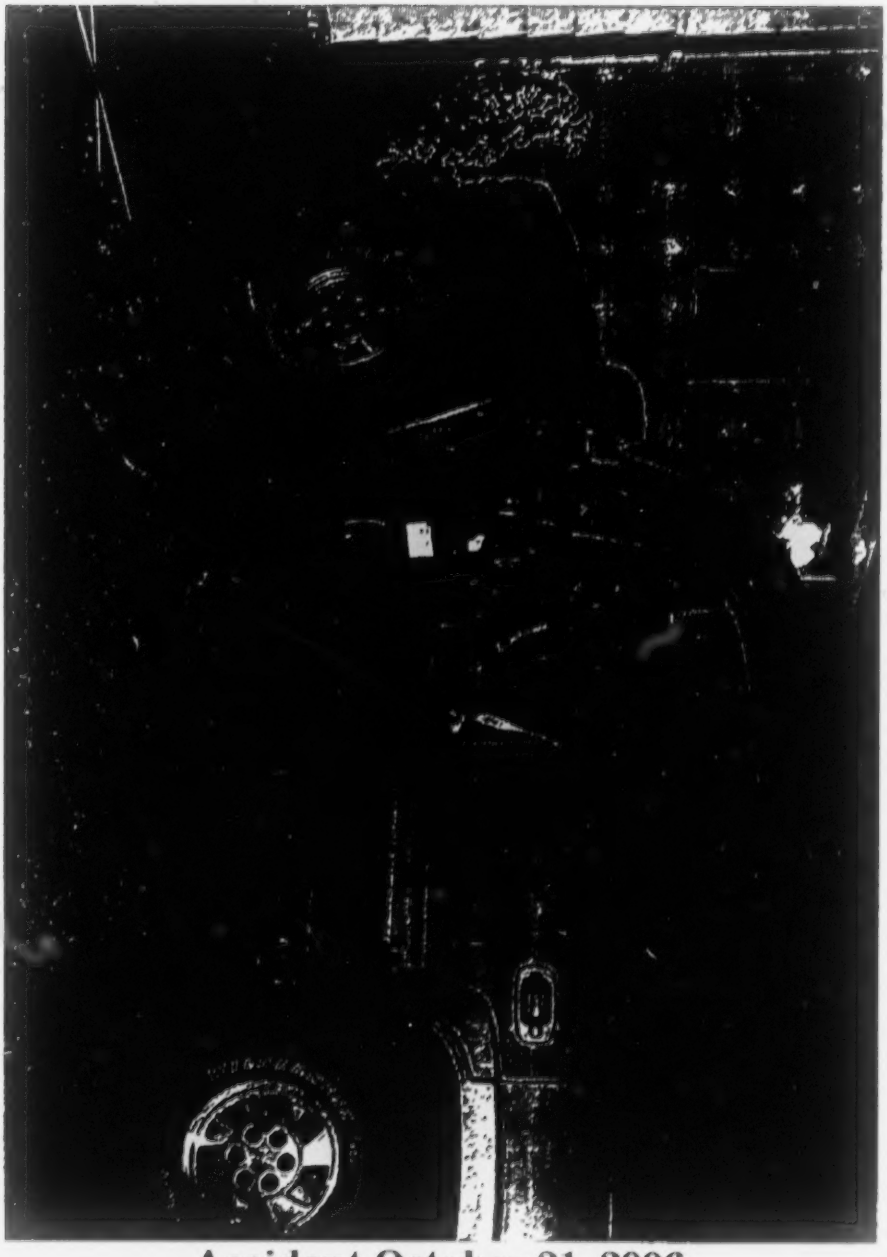
Exhibit E- Current Appraisal of 931 N 121 St., Omaha, NE, also copy of Valuation protest filed with county in June of 2007.

Exhibit F- Landscape design estimates showing minimum cost for land-scaping changes needed to achieve a reasonable level of security and privacy in the backyard. These changes will be necessary to regain

a portion of the loss of value of the Property that has resulted from the City's refusal to put any form of barrier or berm at this intersection. Also copies of fees paid for design consultation and cost of appraisal.

Thank you for your prompt attention to this matter,

/s/ Clinton Gard
/s/ Patricia Gard
931 N 121 St.
Omaha, NE 68154
(402) 342-3150

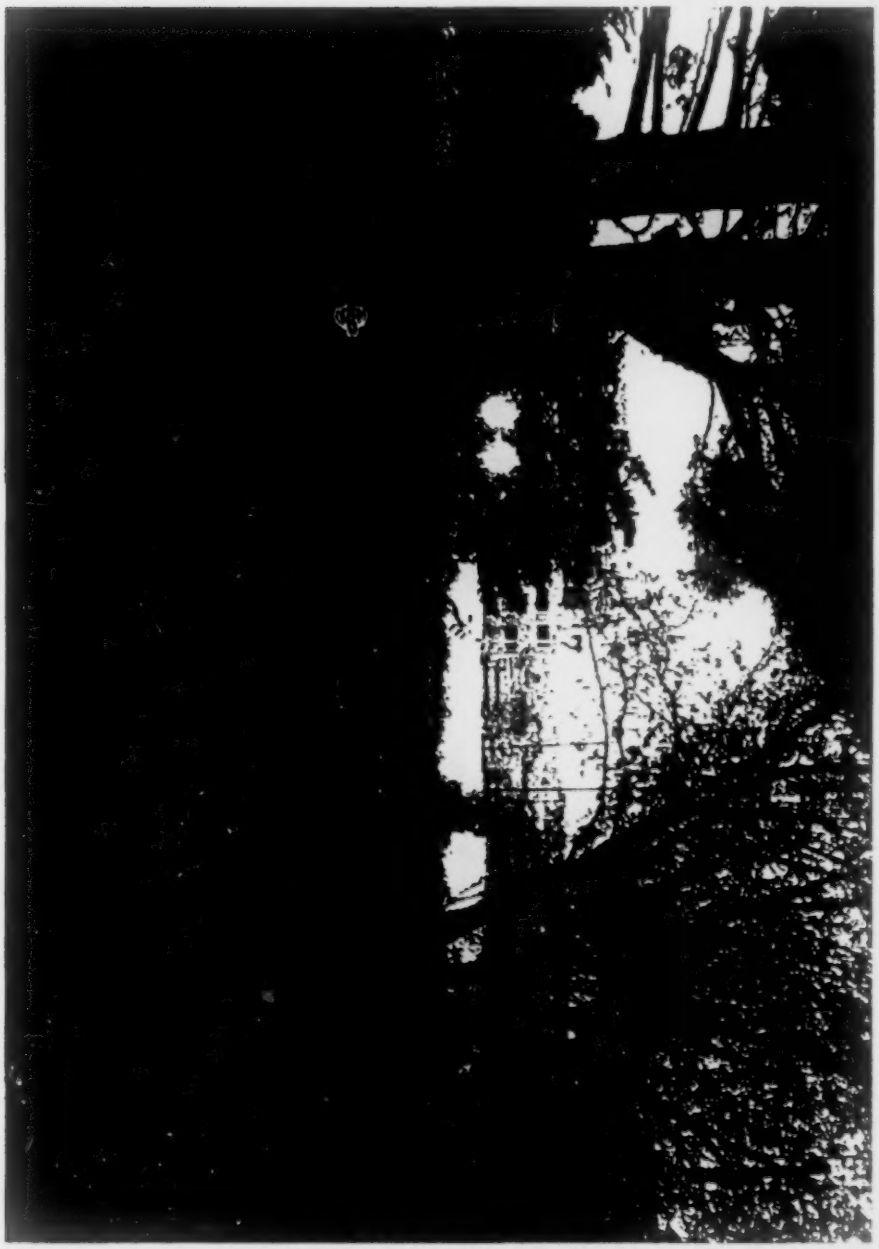


Accident October 21, 2006
Photo: Patricia Gard
Location: 931 N 121 St. Omaha, NE

BEST AVAILABLE COPY

Accident October 21, 2006
Photo: Patricia Gard
Location: 931 N 121 St, Omaha, NE

Accident April 23, 2007
Photo: Patricia Gard
Location: 931 N 121 St, Omaha, NE



Accident April 23, 2007
Photo: Patricia Gard
Location: 931 N 121 St, Omaha, NE

Plaintiffs' property

Before business expansion, construction of improvements
See Resolution 23 in Appendix 81
Exhibit "E1"

After business expansion, Construction of improvements See Resolution 23 in Appendix 81 Exhibit "F1"

KEY NOTES

1. REMOVE EXISTING 8" PCC PAVEMENT
2. CONSTRUCT 8" PCC PAVEMENT WITH INTEGRAL CURB AND GUTTER
3. CONSTRUCT PAVEMENT STRIPPING
4. CONSTRUCT TURN ARROW
5. CONSTRUCT TRAFFIC SIGNAL MODIFICATIONS

Resolution 23
Exhibit E1 from Bill of
Exceptions Vol. II,
page 14

120TH STREET AND
MIRACLE HILLS IMPROVEMENTS
SCALE: 1"=50'

lamp, rynearson & associates, inc.
engineers surveyors planners
14710 west dodge road, suite 100
omaha, nebraska 68154-2028
ph 402 496 2498
fax 402 496 2730

EXHIBIT
E-1

ORAL ARGUMENT FOR JUNE 18, 2010

Note: The actual audio/video archive of this oral argument is currently found on the Nebraska Supreme Court website:

http://www.supremecourt.ne.gov/oral-arguments/coa/archive/6-10-coa-oral-arguments.shtml ***See Friday June 18, 2010 1:00 pm Gard v. City of Omaha A-09-1266***

PLAINTIFF/APPELLANT PATRICIA GARD

1. **PATRICIA GARD :** May it please the Court. We're here today to respectfully ask this Court to reverse the decision of the lower court that awarded summary judgment to the City of Omaha, based on their defense that we failed to file a timely claim pursuant to the Political Subdivision Tort Claims Act. I think we've shown the court the record from the lower court overwhelmingly screams "compelling circumstances".

2. Our property abuts the t-intersection of Miracle Hills Dr. and 120th Sts. In Omaha, , and Miracle Hills Dr. is the only street in and out of a large retail-office area and all traffic will either drive west out of this towards our home or east of it toward Dodge St. There are some restaurants, grocery store, and several bars in the retail area, so the traffic continues to flow past 1:00 in the morning, so the traffic volume is more a day and night situation than if it was an office park.

3. We assigned five errors in our brief, and I just want emphasize facts on the record regarding the Defendant's prior knowledge and position that encompasses all of the errors.

4. The facts before the lower court show that the Defendant had full knowledge of a possible claim nearly five years before we became aware of our injury on October 21, 2006, the day of the first accident. It is an undisputed fact that prior to the discovery of our injury,

5. **COURT:** Mrs. Gard, you agree that's the date you became aware of your claim?"

6. **PATRICIA GARD:** Yes.

7. **COURT:** Alright, thank you.

8. **PATRICIA GARD:** It is an undisputed fact that prior to the discovery of our injury, the Defendant had knowledge of, had notice of, even had overwhelming written protests from businesses that were informed, of dangerous conditions arising from the project that included the intersection changes. Dangerous traffic conditions were discussed at a hearing where there was no public notices as required by law.

9. Concerning petitions for street improvements, *Omaha Municipal Code 26-59* states, "It shall thereupon be the duty of the city attorney to examine the petition. If the petition and the signatures thereon are in due form of law and the requisite frontage feet of taxable property within the district are legally signed for by the record owners thereof upon the petition, the clerk shall so certify to the city council." The City attorney signed off on Resolution 23 on January 8,

2001. This same statute also states that it shall be the duty of the public works director to examine the petition. And the public works director also signed off on the petition on January 8, 2001.

10. At this point the checks and balances that are in place to protect the us from harm failed, as well as protect the City from a possible lawsuit. There was no disclosure as required by statute to any owner of our property that abuts the improvements, and on January 12, 2001, the very same day the Mayor signed the resolution, we purchased this property, unaware of the changes, and we were already in a position for the worse.

11. These facts were before the lower court when summary judgment was granted. In our case, we think the record shows that summary judgment was improper because, citing *Kulhanek v. Union Pacific RR Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999)* "summary judgment is an "extreme remedy because it may dispose of a crucial question in litigation, and citing *Mayer v. Howard, 220 Neb. 328,370 N.W. 2d93 (1985)*, that "any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party"

12. Now moving forward, on October 21, 2006 the first accident occurred, with a car striking our house, and six months later on April 24, 2007 an accident occurred with 2 cars crashing into our backyard. On both occasions we contacted the city immediately, and our communications show the City, at the very highest levels in the Mayor's office

and Omaha Public Works, had full knowledge of the time, place, the damages, and written demands that a barrier or some reasonable alternative happen to make it safe. .

13. From the time of the first accident to shortly after the second accident we were misled that the City was required to be compliant with federal guidelines, and they even sent us an informational sheet in a letter from them that is published by a federal agency as the basis for a denial of our requests to put a barrier in place.

14. Our formal written claim to the law dept. was submitted on April 22, 2008, 18 months after the 1st accident, 12 months after the second accident, 10 months after confirming the federal government was not involved in any way, 9 months after the City agreed to attend the Nebraska Dept of Roads Safety Meetings, and only 6 months after receiving a letter from the Defendant that they were walking away from the problem because, "not one solution could provide absolute and reasonable protection to both family/property and to the driver of the vehicle." An important thing to note is that the record shows that the City's efforts amounted to attending only 2 safety meetings at the Nebr. Dept. of Roads, and exploring only one basic type of barrier with a few variations before slamming the door to any further solutions.

15. Our pleadings included all these facts before the lower court to justify the exceptions required in our Errors in Equitable Estoppel and Continuing Tort.

16. We also believe the facts justify substantial compliance with the Tort Claims Act according to the case of *"Villanueva v. City of South Sioux City, 16 Neb. App. 288 (2008)"* where this Appeals Court determined that , "The notice requirements for a claim filed pursuant to the Political Subdivisions Tort Claims Act are liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act. Additionally, I also want to point out in the Order granting summary judgment, on page 339 of the transcript,

17 **COURT:** Mrs. Gard, I have a question about that case you cite. Didn't that case pertain to the content of the notice that was given an not to the time limit that is imposed under a different statute?

18. **PATRICIA GARD:** I believe the discussion was about, there were several letters that included the requirements. I believe there was a statute of limitations discussion too, that it was outside of it, I believe.

19. **COURT:** OK.

20. **PATRICIA GARD:** Additionally, I also want to point out in the Order granting summary judgment, on page 339 of the transcript, the last paragraph, states, "Plaintiffs' failure to file within the prescribed statutory limits is jurisdictional. As a result, the court is without subject matter jurisdiction." This statement appears to be in conflict with the Court of Appeals in the case of *Villanueva* where the Court of Appeals determines

that the presentment of a claim is not a jurisdictional prerequisite.

21. So we respectfully ask this Court to note any plain errors such as this in this case that you have the option to consider.

22. The last thing in regards to our assignments of error involving the Motion to Compel discovery, the Defendant was under court order to produce certain documents at the time of summary judgment, and we had received documents just four days prior to receiving the Order in the mail. We feel the lower court was in error to stop the progress of our case when there were still facts in dispute, and evidence that the court did not have access to when summary judgment was granted.

23. In conclusion, this decision is going to determine whether we are going to be able to proceed on and attempt to get things back on track to make some necessary changes to make the intersection safe. We are very fearful of another car crashing into the yard, it is a potential life and death matter...

24. Our property value has been affected in a big way, I mean, we have a home, a 4 bedroom home with a big backyard, and no family with kids will probably want to purchase this house when we have to disclose all of this. With no solution other than it will cost us definitely thousands of dollars to try to something in place ourselves or change the landscaping to a configuration to try to keep cars from coming through. We've lost the ability to relax and enjoy ourselves, in our backyard and feel secure, and that's just a basic right of be-

ing at home. Thank you, your honor.

DEFENDANT/APPELLEE CITY OF OMAHA

25. MS. HORVATH: May it please the court, good afternoon, my name is Rose Marie Horvath and I represent the City of Omaha Defendant in this matter. The City's position is that Judge Mullen, the lower court considered the pleadings in the case, our briefs, we were allowed the have a hearing and present evidence on a motion for summary judgment which was based on the City's assertion that the tort claims act has a statute of limitations pursuant to 13-902 and 910 basically says from the time that the action is accrued you have 1 year to bring a claim, and you have 2 years, another section later says, you have 2 years to bring a cause of action.

26. In this case the City contended that the Gards brought their action, unfortunately, too late. It was April 2008 when they bought their claim which was more that 18 months. or two years after the incident in question which was the accrual. The city contends that is was an accident of October 2006 that really brought everything to a head. Now pleadings and some of the other arguments that ever since 2001 they purchased the house they had feelings that something wasn't quite right and they were a little concerned about traffic in the area, but on October 21, 2006 that's when it was apparent from an accident they had a problem, contacted the City, the City said, no we

can't for liability purposes.... we did include a federal guideline ..it says basically.....You can be held strictly liable if you put something in a t-intersection where a driver coming through that intersection could just ram right into it. We could be strictly liable.

27. **COURT:** Were there ongoing discussions between the Gards and the City after that 2006 accident?

28. **MS. HORVATH**: Yes, they had requested at least three times from the public works, the mayor's office, Mr. Harry Owen a traffic engineer to fix the problem, to fix the problem, at no time did the city say there was a Federal responsibility. Every single time we said we cannot for liability purposes put any type of berm or obstruction or a guardrail for that matter in that location. And so the discussions continued all the way to through 2006 and 2007 until the second accident then again more requests came in and at that point we went to the department of roads safety committee.

29. **COURT:** Could you address the Gards' argument that those ongoing discussions were relied upon then, I think that builds into the equitable estoppel argument.

30. **MS HORVATH**: Sure, sure, well number one, the equitable estoppel was never brought up in the pleadings below and the court below never had a chance to address it , come up with any allegations, or defense to the allegations of equitable estoppel. The city contends that as soon as they asked a question we said, we cannot do this for this reason. Then we went further and explain-

ed why. We never said, number one, that the federal government was where you should go to get a reprieve and then come back to us, we'll think about it, we never gave any kind of intentional concealment or misleading fact or said you know just hold on we may be able to fix this, hold on, hold on, hold on which would then toll the statute, at least when I made the case that those are the type of situations we agree are manifestly unjust. That wasn't the case here, the City , the engineers, the traffic, the Mayor's office, when looking at the situation said , I'm sorry, while it is unfortunate, two accidents, no accidents had been reported for ten years prior to 2006, and then, for lack of better words, two freak accidents, one with a drunk driver, and another with a man who had a medical condition, who blacked out, and those were the two scenarios.

31. Now I guess, with the equitable estoppel argument the City contended, its clear and convincing it's a very high standard the Gards have to meet, and they haven't done so in this case cause they haven't offered any evidence that we in fact maliciously or knowingly told them, Well, we may be able to, hold off, we never said that, even going forward to when the federal office suggested there may be some other option, that the city can work with the Gards, even the safety committee said, you know, liability, we're not ready to suggest on either side because of the liability, we really can't make a recommendation. I don't see that as equitable estoppel, I guess if the court wants to penalize us . . . . or hoping there's a way to fix it, I guess the city

would not agree with that , but that's the decision of the court, but from day one the Mayor, the resolution went through, the ordinance went through, there were public hearings, it was advertised , .. in the record , I guess there were complaints, hopefully a public hearing, the city council ruled on this, on the ordinances and the resolution.

32. So, I guess the City disagrees that any type of malicious intent or in any way meant to lead them on. Mrs. Gard or Mrs. Gard is a very proficient writer, they are well versed . It's obvious in the correspondence and the record, they know where to look for answers. One of the equitable estoppel requirements is that they had no way to know the City was liable. As of June 17, 2007 the federal government told them, "We don't have any responsibility", so in June of 2007 why didn't they file their claim? They knew at that point the federal government, the federal highway transportation said no, we're not involved. But at that point, for whatever reason, they didn't file a claim against the city. Again, Judge Mullen heard the arguments from both sides, which didn't include equitable estoppel or continuing tort theory but did rule in favor of the city. If you'd like I can address the issue about discovery, the city really believes this is about the statute of limitations under the tort claims act, which is a very clear requirement. And it clearly wasn't met in this case.

33. **COURT:** The documents to which Mrs. Gard referred to in her argument, about the

additional discovery, are not actually in our appellate record, are they?

34. MS. HORVATH: No, they will not be, no. And the City is a little unclear about what exactly they show. Are they different than the previous documents? For those reasons the City asks that you affirm the ruling of Judge Mullen and .... Thank you.

REBUTTAL – PLAINTIFF/APPELLANT PATRICIA GARD

35. PATRICIA GARD: I'm just going to cite in our brief *Greer v. Chelewski, 1956 (76 N.W. 2d 438, 162 Neb 450.) "A party entitled to estoppel need not in all cases formally plead the estoppel, and if the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom."*

36. I just want to point out in the transcript page 214, letter from Harry Owen, quote, "As stated before placing any kind of guardrail would violate several federal standards that we must follow." That was the second time, the first time I was told that it was on the phone. Page 215 shows the report 350 from the National Highway Research program enclosed with that. And then in a letter in May 2007, this was after the second accident, this was a letter from Todd Pfitzer traffic engineer .....

37. **COURT:** Mrs. Gard I was hoping you would finish your sentence quickly but your time has expired, so we will consider your arguments as well as the brief that Mr. Gard filed as well, as you did as well, thank you very much.

38. **PATRICIA GARD**: Thank you.

Exhibit A to Appellants Brief in Support of Motion for Rehearing Proving the Elements of Estoppel

Element I. Conduct that amounts to concealment or misrepresentation

2001 - lack of notices (T171-187)(T323-336)

2006 - 3 instances (twice after the 1st accident and once after the 2nd) of informing Plaintiffs that federal guidelines would be violated if a barrier were constructed at the intersection (T260) (T222-223)

Element II. Intent to influence

2001 – removing any means of protest, lulling Plaintiffs into a sense of false security by not disclosing dangers or future plans involving their property that abuts proposed intersection improvements to accommodate planned increases in traffic volume

2006 - 1) causing Plaintiffs to believe that possible litigation involving the federal government may be necessary, and then 2) agreeing to attend NDOR safety meetings where solutions were being researched and discussed. (T260) (T222-223) (E4:5-11 Vol. II) (T74-75) (T234)

Element III. Knowledge of the facts.

2001 - knowledge of dangerous conditions: (T323-T336) statutes regarding street improvement by petition: *Omaha Mun.Code 1980, § 26-59)*(Code 1980, § 26-60)

2006 – several top city officials were provided copies of these communications. (T220) (T221)

Element IV. Lack of knowledge

2001 - no possible means of knowledge of the project or future conditions where no notices provided

2006 - no knowledge of City's liability until after 2nd accident until Plaintiffs contact Federal Highway Administration.

Element V. Reliance in good faith

2001 - relying on the belief that the City of Omaha would follow its own statutory notice requirements if it would be required of them.

2006 - relying on the belief that communications with engineers and other officials of the City of Omaha would be truthful and accurate.

Element VI. Action or inaction based upon the lack of knowledge, change position for the worse

2001 - We purchased house then built garage. If proper notices were provided it would have given us a chance to change our plans, protest the changes, and be warned of possible dangerous conditions.

2006 - We did not file lawsuit during time we believed federal government had authority and while it appeared a solution was forthcoming from the safety committee meetings.

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(2)

No. 10-1260

Supreme Court, U.S.
FILED
MAY 12 2011
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In The

Supreme Court of the United States

CLINTON GARD AND PATRICIA GARD,

Petitioners,

vs.

CITY OF OMAHA, NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Nebraska

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROSEMARIE R. HORVATH
Assistant City Attorney
Counsel of Record
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, NE 68183
402.444.5115
RoseMarie.Horvath@ci.omaha.ne.us
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Petitioners' Writ of Certiorari appears to raise the following three questions:

1. Did the Nebraska Court of Appeals correctly affirm the decision of the Douglas County District Court granting summary judgment to Respondent?

2. Did the Nebraska Court of Appeals violate Petitioners' right to due process by affirming Douglas County District Court's decision granting Respondent's summary judgment?

3. Did the decision of the Nebraska Court of Appeals invoke the supervisory powers of the United States Supreme Court by granting Respondents' summary judgment?

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CITATION OF OPINIONS AND ORDERS BELOW

Nebraska Court of Appeals: *Gard v. City of Omaha*, 18 Neb. App. 504, 786 N.W. 2d 688 (2010), *review denied* by Nebraska Supreme Court, November 10, 2010.

Douglas County District Court, J. Patrick Mullen, Order Granting Defendant's Motion for Summary Judgment dated November 30, 2009.

BASIS OF JURISDICTION

In their Petition for Writ of Certiorari, Petitioners assert that jurisdiction is proper under 28 U.S.C. § 1257(a). See Petition, pg. 1. Title 28 U.S.C. § 1257(a) expressly states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority.

Petitioners contend that basis for jurisdiction is that the Court of Appeals' affirmation of the District Court's granting of Defendant's summary judgment is in conflict with other State court of appeals decisions. Petition, pg. 6. On November 10, 2010, the Nebraska Supreme Court declined to hear Petitioners' case. See Petition, pg. 1. This case does not involve a federal question nor is there a conflict between jurisdictions on an important federal question. Based on the foregoing, there is no basis for viewing this as a Petition for an Extraordinary Writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS (EXCERPTED)

28 U.S.C. § 1254(1):

> **Courts of appeals, certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

Rules of the Supreme Court of the United States, Rule 10:

Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

> decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

NEB. REV. STAT. § 13-902 (Reissue 2007):

> . . . [N]o suit shall be maintained against such political subdivision or its officers, agents or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivision Tort Claims Act.

NEB. REV. STAT. § 13-919(1) (Reissue 2007):

> Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued . . .

STATEMENT OF THE CASE

Clinton and Patricia Gard ("Petitioners") seek a writ of certiorari from the United States Supreme Court. On March 16, 2009, Petitioners filed an action

in Nebraska state court under the Nebraska Political Subdivision Tort Claims Act, NEB. REV. STAT. § 13-901 et seq. (Reissue 2007). The Petitioners alleged the City of Omaha ("Respondent") was negligent by failing to install a guardrail or berm to protect their private property from errant vehicles. They further alleged the Respondent is responsible for the damage to their residence, the diminution in value of their property, and the loss of use and enjoyment of their backyard. The Respondent filed an answer denying liability. The parties proceeded with discovery. The Respondent moved the District Court for a summary judgment based on the Petitioners' untimely filing of their claim and their subsequent lawsuit. The parties submitted briefs and the District Court heard oral arguments. On November 30, 2009, the District Court granted Defendant's Motion for Summary Judgment based on Petitioners' failure to timely file the tort claim and the lawsuit within the statutory time period.

On December 16, 2009, Petitioners filed their appeal of the District Judge's order to the Nebraska Court of Appeals. The parties submitted briefs and the Court of Appeals heard oral arguments before a three judge panel (Moore, Cassel, Chief Judge Inbody). On August 3, 2010, the Court of Appeals released a written, published opinion affirming the judgment of the District Court. Petitioners then filed a motion for rehearing which was overruled on September 1, 2010. Petitioners filed a petition for further review to the Nebraska Supreme Court which was

denied on November 10, 2010. Petitioners then filed a motion to stay mandate and a motion to reinstate the appeal which were both overruled on November 19, 2010. Finally, Petitioners filed a motion to reconsider and amend the petition for further review and motion to stay mandate which was overruled on November 24, 2010.

STATEMENT OF FACTS

The genesis of Petitioners' claim surrounds their unrelenting obsessive mission to seek monetary compensation for the diminution of their property which they attribute to the City's negligence in not installing a guardrail or a berm to protect their property from errant vehicles.

The following material facts adduced on the Respondent's motion for summary judgment were undisputed and required entry of summary judgment in favor of the City:

1. Petitioners own the property at 931 North 121st Street, Omaha, NE 68154, which is directly west of the intersection of 120th Street and Miracle Hills Drive ("T-intersection").

2. When Petitioners purchased the subject property, their backyard faced the three westbound lanes at the T-intersection. Nebraska Court of Appeals Transcript, pg. 5 (hereinafter the Court of Appeals' Transcript is referred to as "T").

3. From December 2000 to January 2001, the City Council held three separate hearings on the proposed Ordinance 35432 which included the turning lane improvements at the T-intersection. (T159) Design of the turning lane improvements occurred in 2000. Nebraska Court of Appeals Bill of Exceptions, Exhibit 1, 8-17:8, Vol. II (hereinafter the Bill of Exceptions' Exhibits are referred to as "E").

4. On January 8, 2001, Council approved the Development Agreement which included turning lane improvements at the T-intersection. (E1, 18:8, Vol. II)

5. The turning lane improvements at the T-intersection lanes reconfigured the three westbound lanes (which faced Petitioners' back yard) into two left hand turning lanes and two right hand turning lanes. (E1, 14, 16:8, Vol. II)

6. Construction of the turning lane improvements was performed after Petitioners purchased their property. (E6, 22:8, Vol. II)

7. On October 21, 2006, a vehicle driven by a drunk driver proceeding west through the T-intersection left the roadway and entered Petitioners' property. Immediately after the accident, Patricia Gard telephoned the City and spoke with Harry Owen of the City's Traffic Maintenance Division about her concerns relating to the accident which occurred and voiced her concerns about the redesign of the turn lanes at the T-intersection. Complaint, paragraph 5 (T1-2). Deposition of Patricia

Gard 24:5-26:4; 37:25-39:7; 40:2-41:23 (E6, 24-26, 37-39, 40-41:8, Vol. II).

8. After the October 21, 2006 accident, Patricia Gard thought that there were problems with the intersection and was concerned about the "very, very" heavy flow of traffic caused by the redesign. Deposition of Patricia Gard 36:17-37:3.

9. After the first auto accident on October 21, 2006, the Petitioners concluded that there was a problem with the four lane T-intersection and the location of their property. Deposition of Clinton Gard 10:15-24; 12:2-6.

10. As of October 30, 2006, the Petitioners' main concern was about the traffic lane and traffic signal design at the T-intersection and voiced such concerns to the City of Omaha. Deposition of Patricia Gard 21:20-24:4, 40:14-24; 41:19-44:5, 46:20-49:23. Deposition of Clinton Gard 10:15-24; 12:2-6.

11. On October 30, 2006, Harry Owen responded to Petitioners' concerns in writing indicating that the accident history for the T-intersection shows no other accidents of that kind reported in the previous 10 years. Mr. Owen informed Petitioners that guardrails are not to be used to protect private property abutting the roadway because the City could be liable if a car strikes something that the City has placed in the right of way. He also provided Petitioners with information from the National Cooperative Highway Research Program, Report 350.

12. On November 2, 2006, Petitioners sent Mr. Owen a lengthy correspondence outlining their concerns about the traffic lane redesign at the T-intersection. Petitioners stated that the recent design changes to the T-intersection increased the chance of errant vehicles coming onto their property because of the allegedly increased amount of overflow traffic from Dodge Street.

13. Petitioners again wrote to Mr. Owen on December 1, 2006, to argue their position that the City could make the intersection safer while not inconveniencing drivers or increasing the City's liability. Petitioners indicated that their situation should be an exception to the City's guidelines for putting a barrier at the T-intersection. Owen Affidavit, Exhibit D (E2, 3, 8:8, Vol. II).

14. On December 26, 2006, Mr. Owen emailed the Petitioners informing them once again that the City could not place any form of barricade at the T-intersection due to safety concerns for motorists.

15. On April 24, 2007, the second auto accident caused by one driver "blacking out" at the wheel and rear-ending another vehicle resulted in the vehicles entering Petitioners' property. Complaint paragraph 7 (T2). Deposition of Patricia Gard 32:17-34:7.

16. On April 25, 2007, Petitioners wrote to the Mayor's Office complaining that the City added westbound lanes which increased the flow of traffic towards their house and requested that the safety issues at the T-intersection be addressed.

17. In response to Petitioners' letter to the Mayor's Office, on May 7, 2007, Todd Pfitzer, the City's Traffic Engineer, wrote to the Petitioners and explained to them the dangers to motorists of installing a guardrail or barrier at the intersection. He also explained that placing each signal head on separate poles would create a hazardous condition which could lead to injury of a motorist who traveled west through the intersection. Mr. Pfitzer told Petitioners that the City cannot install a device that would very likely cause severe injuries to a motorist who mistakenly proceeds through the T-intersection. Mr. Pfitzer offered to increase the size of the diamond-shaped reflector signs to the maximum allowable size to emphasize to approaching motorists that the roadway ends and does not continue west through the intersection.

18. The City of Omaha agreed to bring the matter before the Nebraska Department of Roads Safety Committee ("Committee") for discussion. The matter was heard by the Committee on June 12, 2007, and, again on July 10, 2007. After discussion, the Committee decided it could not fashion a solution that would provide reasonable safety for both motorists and the Petitioners.

19. On September 10, 2007, Todd Pfitzer received an email from Yodock Wall Company wherein Leo J. Yodock, President, reiterated that the Yodock barriers have not been crash tested at T-intersections such as the one in question. The email confirms an earlier telephone conversation between Mr. Yodock

and Todd Pfitzer and states that Yodock will not likely be able to find an engineer willing to "sign off" on the installation simply based on theoretical analysis rather than actual crash tests.

20. On October 2, 2007, Todd Pfitzer responded to the Petitioners' concerns once again, indicating that the City contacted a manufacturer of highway barriers to inquire into the feasibility of constructing a roadway barrier for this situation. Mr. Pfitzer indicated that the manufacturer had informed the City that it would not provide a barrier because of the lack of testing with respect to 90-degree impacts and the potential liability of installing an untested device.

21. Petitioners knew or should have discovered the existence of their possible claim against the City by, at the latest, October 21, 2006, when the accident alerted them to the possible claim and Petitioners complained to the City about it. Complaint paragraph 5 (T1-2). Deposition of Clinton Gard 12:2-6. Deposition of Patricia Gard 37:25-39:7.

22. Petitioners' Notice of Tort Claim pursuant to NEB. REV. STAT. § 13-901, alleging that they sustained damages due to the City's failure to remedy a dangerous condition at the T-intersection, was not filed with the Omaha City Clerk until April 22, 2008.

23. On March 16, 2009, Petitioners brought this lawsuit alleging negligence in the design of the T-intersection which they allege increased the danger to Petitioners; negligence in failing to protect their property from errant vehicles; and seeking damages

and injunctive relief against the City of Omaha. Petitioners did not plead any facts or arguments regarding equitable estoppel. Complaint paragraphs 1-15. (T1)

24. Petitioners do not know of any law or regulation that would require the City to install a guardrail or barrier in between 120th Street and their backyard. Deposition of Patricia Gard 58:9-12. Deposition of Clinton Gard 17:13-19.

25. The City's Public Works personnel used their experience and engineering judgment to determine how best to accommodate increasing traffic in the area and secure public safety. The T-intersection was redesigned in 2000-2001 to add turning lanes for westbound Miracle Hills Drive, to better accommodate increasing traffic in that area and in the westbound direction. The redesign was a discretionary use of engineering principles.

26. The proposed City Council Ordinance No. 35432 which included the proposed turning lane improvements at the T-intersection was published on December 15, 2000, in The Daily Record of Omaha. (T158). Ordinance No. 35452 was passed at the January 8, 2001, City Council meeting. (T157).

27. The proposed City Council Ordinance No. 35637 for construction of turning improvements at the T-intersection was published on June 22, 2001, in The Daily Record of Omaha. (T193). After the first, second and third readings (and public hearing) on Ordinance No. 35637 were held, the Omaha City

Council approved the construction of the turning lane improvements at the T-intersection.

ARGUMENT

I. THE LOWER COURTS' GRANTING OF SUMMARY JUDGMENT TO RESPONDENT DOES NOT WARRANT REVIEW BY THIS COURT

A. This Case Does Not Involve Any Important Federal Question Requiring Review From This Court

United States Supreme Court Rule 10 describes the considerations governing the grant of writs of certiorari. Initially, the Rule states that review on a writ of certiorari is not a matter of right, but of judicial discretion. "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, S.Ct. Rules. Rule 10(a) and (c) involve certain decisions on "important federal question[s]."

Petitioners are unhappy because the District Court determined that they had failed to file their tort claim and their lawsuit within the prescribed statutory timeframe. This is clearly not an "important federal question" pursuant to Rule 10 of the Supreme Court Rules. The Petition has presented three questions for review. However, a review of those questions indicates that Petitioners do not allege that the Nebraska Supreme Court entered a decision that conflicts with a decision of another State court of last

resort. Moreover, Petitioners do not allege that the issues they raise in their Petition are important federal questions that need to be resolved by this Court. Instead, a close reading of the issues demonstrate that Petitioners are asking this court to review pretrial discovery orders, evidentiary rulings, and other rulings by the lower courts. Notably, Petitioners did not raise in the courts below any constitutional question which they now urge this Court to consider.

B. A Writ Is Rarely Granted For A Misapplication Of Law Claim

Rule 10 adds that a petition for a writ of certiorari is "rarely granted" for "erroneous factual findings or the misapplication of a properly stated rule of law." The latter is the situation in the present case. Petitioners argue that the lower courts "misapplied" Nebraska law by erroneously applying the statute of limitations and failing to apply the continuing tort and equitable estoppel doctrines to toll the statute of limitations.

Petitioners fail to acknowledge that the only true issue is whether they timely filed their tort claim and lawsuit under the Nebraska Tort Claims Act.[1]

---

[1] NEB. REV. STAT. § 13-919(1) expressly states that every claim against a political subdivision permitted under the Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body.

Petitioners' argument regarding what other State courts have done with regard to granting summary judgment while discovery is ongoing is misplaced. None of the cases cited by Petitioners address a case where the lawsuit is dismissed for lack of jurisdiction based on a statute of limitations defense versus a factual issue. Thus, the Petition for Writ of Certiorari asserts nothing more than the "misapplication of a properly stated rule of law." Pursuant to Supreme Court Rule 10, certiorari is "rarely granted" under those circumstances. Accordingly, certiorari should not be granted on this issue.

C. In The Proceedings Below Petitioners Did Not Raise A Constitutional Challenge

Petitioners have manipulated the questions presented in an attempt to have the writ granted. The questions presented and identified as 1, 2, and 3 are in no way similar to the questions that have previously been heard by the District Court or the Nebraska Court of Appeals. A review of the lower courts' decisions that appear in Petitioners' Appendix make this clear. See Petition, App. 1, App. 16. The only issues the Douglas County District Court heard were Petitioners' allegation of Respondent's negligence, allegations of incomplete discovery responses against Respondent, and Respondent's statute of limitations defense under the Nebraska Tort Claims Act. Moreover, the only issues heard by the Nebraska Court of Appeals were Petitioners' allegations of the

District Court's error in granting the summary judgment and their request to apply the doctrines of equitable estoppel and continuing tort against Respondent's statute of limitations defense. A review of the three questions presented by the Petitioners demonstrates no circumstances exist for which this Court typically grants a writ of certiorari.

D. Due Process Was Satisfied In This Case

The Petitioners have mischaracterized the facts in the hopes of persuading this Court that there has been a constitutional deprivation of their due process rights by the Nebraska Court of Appeals. They repeatedly contend that facts are being intentionally hidden by Respondent and intentionally not addressed by the lower courts. Petitioners would have you believe that Respondent intentionally mislead, fraudulently concealed or misrepresented facts in order to delay filing of Petitioners' tort claim until they were outside of the time period allowed under the statute. However, there was never any such concealment or misrepresentation. The record is devoid of any type of concealment or misrepresentation. Respondent informed Petitioners repeatedly that it could not and would not install a guardrail or berm to protect private property.

Petitioners go further with their mischaracterization and allege they were denied due process because of an ongoing conspiracy between the City of Omaha, the Honorable J. Patrick Mullen of the Douglas

County District Court and the Justices of the Nebraska Court of Appeals; with all three agents acting as a "tag team" working together to "avoid the facts." The essence of due process is that a person be given notice and an opportunity for hearing. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). This due process requirement applies where a property interest is being taken away. In this case there has been no property deprivation by the government, just damage to property caused by the random acts of the negligent drivers.

Furthermore, these issues were not raised in the lower courts. The evidence presented does not support their assertions. Petitioners are simply trying to avoid the true issue at hand: whether they filed their tort claim and lawsuit on time. They conveniently do not address in their Petition why they did not file their tort claim within the time allowed. The evidence introduced to the lower courts shows that Petitioners simply failed to file their claim on time and the failure to file was not caused by any misrepresentation or concealment of facts by Respondent. Notably, no amount of speculation about what evidence would possibly have been discovered can turn back the clock and reverse their mistake.

II. THE NEBRASKA COURT OF APPEALS DID NOT ERR IN UPHOLDING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Although the Petition presents new and creative arguments before this Court, the specific issues Petitioners brought before the Nebraska Court of Appeals were: (1) whether the district court erred by not applying the continuing tort doctrine to the statute of limitations; (2) whether the district court erred by not applying the equitable estoppel doctrine; and, (3) whether the district court erred in granting Respondent's Motion for Summary Judgment while discovery was continuing. The Court of Appeals considered the statutory framework, the record before them and the oral arguments, before rejecting Petitioners' theories asserted to excuse the untimeliness of their filings. Petition, App. 14.

A. Petitioners Filed Their Tort Claim Out Of Time

Petitioners are under the mistaken belief it does not matter that the District Court dismissed their lawsuit for lack of jurisdiction (statute of limitations defense) because they have an absolute due process right to present all of their evidence and have their day in court. This is ignoring the statutory framework under which they brought their cause of action.

In Nebraska, to establish a tort claim against a political subdivision such as the City of Omaha, a

claimant must file a written claim within one year from the time the cause of action accrued. NEB. REV. STAT. §§ 13-905 and 13-919 (Reissue 2007). Compliance with the notice requirement of NEB. REV. STAT. § 13-905 is a procedural precedent to commencement of an action under that Act; noncompliance with the notice requirement is a defense to causes of action to recover in tort. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W. 2d 207 (1990). The notice of claim requirements of the Tort Claims Act is a condition precedent to the institution of suit against a political subdivision. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W. 2d 102 (1986). A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W. 2d 327 (1988). "In the absence of a statute providing otherwise, ignorance of the existence of a cause of action ordinarily does not toll the statute of limitations, particularly where the facts may be ascertained by inquiry or diligence." *Ward*, 227 Neb. at 310, quoting 54 C.J.S. *Limitations of Actions* § 205 at 216 (1948).

The Nebraska Court of Appeals' opinion in this case cited and applied these same rules. See *Gard*, 18 Neb. App. 504, 786 N.W. 2d 688 (2010). The Court of Appeals' opinion correctly cited the rule from *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W. 2d 636 (1996), which states that a cause of action accrues, thereby starting the period of limitations,

when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.

Notably, the Petition for Writ of Certiorari does not appear to contest the constitutionality of the Nebraska Tort Claims Act statute of limitations for a tort claim against a municipality, as stated and applied by the Court of Appeals. See Petition, App. 9. Thus, there appears to be no grounds under Supreme Court Rule 10 for granting writ of certiorari on this claim. To the contrary, Petitioners merely reargue the facts and assert new facts, pointing only to the fact that discovery was continuing and the Respondent was subject to a motion to compel; thus the District Court should not have granted Respondent's summary judgment. Petition, pp. 15-16. Again, these asserted errors are nothing more than allegations of "the misapplication of a properly stated rule of law" – matters for which certiorari should be "rarely granted," under Supreme Court Rule 10.

B. Petitioners Failed To Allege And Prove Any "Continuing Tort" That Extended The Accrual Of The Cause Of Action

In their Appellate Brief pp. 15-19, Petitioners argued for the first time that the trial court erred by granting summary judgment without applying the doctrine of continuing tort to toll the statute of limitations found in NEB. REV. STAT. § 13-919. The Nebraska Court of Appeals denied application of the

doctrine because it requires that a tortious act – not simply the continuing ill effects of prior tortious acts – fall within the limitations period. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W. 2d 376 (2007). The Court of Appeals emphasized that the necessary tortious act cannot merely be the failure to right a wrong committed outside the statute of limitations, because, if it were, the statute of limitations would never run because a tortfeasor can undo all or part of the harm. Citing *Alston*, 273 Neb. at 426. See Petition, App. 11. The court also held that no Nebraska case law has applied the doctrine to claims brought under the Tort Claims Act, and they declined to do so in this case. Petition, App. 12.

C. Petitioners Failed To Properly Plead And Prove Equitable Estoppel

In their Appellate Brief, Petitioners argue for the first time that the district court erred by granting the summary judgment without applying the doctrine of equitable estoppel. They argued that ending their case on a statute of limitations basis due to the delay in filing their claim would cause manifest injustice. However, the District Court could not consider the equitable estoppel argument because Petitioners never made it in any previous oral argument, brief or pleading.

The Court of Appeals reasoned that the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling

circumstances where right and justice so demand. *Lowe v. Lancaster Cty. Sch. Dist.* 0001, 17 Neb. App. 419, 766 N.W. 2d 408 (2009). The Court of Appeals stated that equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W. 2d 306 (2000). Notwithstanding the fact that the Petitioners asserted equitable estoppel in avoidance of the statute of limitations rather than as an affirmative defense, the Court of Appeals held that the Petitioners' pleadings did not sufficiently allege equitable estoppel. See, generally, *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W. 2d 668 (1997).

The Court of Appeals further held that even if Petitioners had properly pleaded equitable estoppel, they could not establish the six elements for estoppel to apply. See also *Lowe, supra*.

CONCLUSION

Petitioners have very creatively attempted to mischaracterize and manipulate the issues to make it appear that they have suffered a constitutional deprivation so this Court will grant certiorari. However, the issues as presented by Petitioners do not satisfy the requirements of Supreme Court Rule 10 for those cases in which this Court exercises its discretion to grant certiorari.

Following the guidelines of Supreme Court Rule 10, the Petition for Writ of Certiorari should be denied. Furthermore, the Petition should be denied because Plaintiff's assigned errors are unsupported by the record and lack merit.

Respectfully submitted,

ROSEMARIE R. HORVATH
Assistant City Attorney
Counsel of Record
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, NE 68183
402.444.5115
RoseMarie.Horvath@ci.omaha.ne.us
Counsel for Respondent

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
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No. 10-1260

In the Supreme Court of the United States

Clinton Gard,
Patricia Gard,
Petitioners

vs

City of Omaha,
Respondent

On Petition for Writ of Certiorari to the
Nebraska Court of Appeals

Reply Brief of Petitioners

Clinton and Patricia Gard
Pro Se Petitioners
931 N 121 St.
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REPLY BRIEF FOR PETITIONERS

Introduction

The basis of Respondent's arguments allege that 1) Petitioners filed a claim pursuant to the Nebraska Political Tort Claims Act with the city 6 months too late pursuant to the Nebr. Political Tort Claims Act; 2) there are no circumstances that provide for estoppel or waiver; 3) summary judgment was proper; 4) so therefore no constitutional issues exist.

Respondent denies the existence of an extensive record of relevant facts before the lower courts to stay within parameters leading to the strictest application the statute of limitations. Unfortunately the lower courts have followed suit thereby eliminating the necessity of the Respondent to answer to a large portion of the record.

However when all facts on record come into the light this Court will be shown compelling facts and circumstances of this case overwhelmingly create a federal question, violate Petitioners' right to due process, satisfy the requirements of Supreme Court Rule 10 and warrant review by this court.

ARGUMENT

THE ISSUES CREATE A CONSTITUTIONAL QUESTION THAT IS FAR REACHING AS THE OPINION OF THE NEBRASKA COURT OF APPEALS IS PUBLISHED AND MAY AFFECT FUTURE CASES.

The Opinion could be used in future cases regarding the rights of others involved in cases involving summary judgment being granted during ongoing court ordered discovery. (App. 1)

Within this Opinion, the Court of Appeals acknowledges that estoppel can be applied to the statute of limitations. (App. 12)

This Opinion acknowledges there are documents still being obtained under ongoing court ordered discovery when summary judgment was entered. These documents were not yet before the court. Then, however, the Nebraska Court of Appeals crosses the line of accepted judiciary standards concerning summary judgment and proceeds to weigh the unseen evidence by stating, "This additional evidence could not have affected the time of the filing of their claim or the time they knew they had a claim, i.e., after the first accident on October 21, 2006." (App. 15)

This action violates Petitioners' right to due process under U.S. Const., Art. XIV, §1 as we are entitled to a fair hearing before an impartial judge.

Nebraska law also provides that "when ruling on a motion for summary judgment, a court must not weigh evidence or make credibility determinations." *Kenney vs. Swift Transportation Co. 347 F.3D 1041, 1044 8th Cir 2003.*

As Petitioners discovered after this Opinion was published there was evidence being withheld from Petitioners during court ordered discovery concerning a prior court order concerning the rights of abutting property owners to the project (App. 51), definitely triggering estoppel because "Equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations. . . and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present." *Olsen v. Olsen, 657 N.W.2d 1, 8 (Neb. 2003)* and "One who conceals material facts, which delays filing of suit, cannot avail himself of statute of limitations defense." *Frezell v. Iwersen 436 N.W. 2d 194, 231 Neb. 365. C.A. 8 (Neb.) 1991.*

The record clearly reveals Respondent was aware of a possible claim 5 years prior to the damages occurring, violated notice laws, concealed knowledge of dangerous conditions being created due to a planned increase in traffic volume in conjunction with the construction of the improvements, misrepresented that the federal government prohibited changes to the intersection, and engaged in the appearance of working toward a solution with the Nebraska Department of Roads

thereby fulfilling all elements necessary for estoppel. The facts clearly show no argument left for a statute of limitations defense.

THE UNITED STATES SUPREME COURT PROVIDES GUIDANCE REGARDING EVIDENCE NOT YET BEFORE THE DISTRICT COURT WITHIN THE MOST CURRENT FEDERAL CASE LAW REGARDING SUMMARY JUDGMENT.

In *Celotex Corp. v. Catrett 477 U.S. 317, 106 S.Ct. 2548* this court states, "Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. See *244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (Bork, J.,dissenting); 10A C. Wright,A. Miller, & M. Kane)*

The decision of the Douglas County District Court to grant summary judgment during a sustained ongoing court ordered discovery can be considered to be rendered "sua sponte" as there were no further instructions from the court, motions, hearings or stipulations regarding the sustained motion to compel discovery that was concurrently granted at the time of taking Respondent's motion for summary judgment under advisement. The granting of summary judgment occurred 2 months (E22:23-24 V. I) (T337) from the date from granting motion to compel discovery.

This is not an unreasonable time for ongoing discovery. Documents were obtained only four days prior to Petitioners receiving the Order in the mail granting summary judgment to Respondent.

Additionally, the Order of the District Court granting summary judgment in favor of Respondent does not make any reference to the ongoing court ordered discovery. (App. 16) The district court stated that a waiver can apply to the statute of limitations, therefore evidence could be (and was) produced that could affect the timing of the claim. (App. 36, 12-20). The court also stated there was an ongoing obligation to provide documents requested by Petitioner's Motion to Compel Discovery. (App. 49 8-13, App. 50 20-23) As a result genuine issues still existed and summary judgment was premature, improper, and unjust because Petitioners, as the losing party, were not put on notice by the Douglas County District Court to come forward with all of their evidence.

RESPONDENTS WERE PUT ON NOTICE BY AN ORDER FROM THE DOUGLAS COUNTY DISTRICT COURT IN 2001 THAT FUTURE CLAIMS MAY ARISE FROM ABUTTING PROPERTY OWNERS TO THE PROJECT.

In retrospect the error of the district court prematurely ending court ordered discovery becomes grave and manifestly unjust in the light of the discovery of the Respondent withholding documents pertaining to a prior lawsuit filed in the

Douglas County District involving the Development Agreement including the Improvements by Petition abutting Petitioner's property. The court order addressed issues concerning rights of abutting property owners to the project that included the street improvements by petition. The order of the Douglas County District Court in *Waite v. City of Omaha, Douglas County District Court 1001-116, See also Nebr. Supreme Court S01-193* put the Respondent City of Omaha on notice in 2001 that future claims for damages from abutting as well as non-abutting owners in special circumstances may arise from the project that included vacating a street in addition to the street improvements abutting Petitioners' property. (App. 56-64)

Petitioners attached the newly discovered court order to their Emergency Motion to Reinstate Appeal and Emergency Motion to Amend Petition for Further Review and Stay the Mandate. (Apps. 21, 51) Both motions were procedurally overruled with no rebuttal or opposition from the Respondent or any written analysis from the Nebraska Court of Appeals or the Nebraska Supreme Court., further denying Petitioners' due process rights for a fair hearing regarding this exceptional discovery.

From this point the facts dispel all doubt that summary judgment is improper and the Respondents can no longer rely on the argument that Petitioners simply filed their claim six months late in the light of overwhelming negligence and

ongoing, intentional misrepresentation by Respondent.

We believe this court should issue an opinion stating that summary judgment never be granted during ongoing court ordered discovery with no further instructions, hearings, motions, or stipulations within a reasonable time to prevent summary judgment from being prematurely granted in other cases such as this.

OTHER STATE COURTS OF APPEAL ARE IN CONFLICT WITH THE DECISIONS OF THE NEBRASKA COURTS TO GRANT SUMMARY JUDGMENT BEFORE DISCOVERY IS COMPLETED. See Petition Pages 10-12.

PETITIONERS RAISED CONSTITUTIONAL ISSUES OF DUE PROCESS VIOLATIONS IN THE PROCEEDINGS BELOW

Petitioners raised constitutional questions concerning loss of due process rights within their original claim for damages and within their complaint filed in the district court. Respondent alleges that a constitutional issue was not raised in the lower proceeding, (Brief in Opp. Page 15) while just 10 pages earlier admits that as early as within Petitioners' claim for damages that Petitioners "alleged the Respondent is responsible for the damage to their residence, the diminution of value of their property, and the loss of use and enjoyment

of their backyard." (Brief in Opp. Page 5) These claims obviously fall under the rights protected by Art. XIV, §1 as the right to quiet enjoyment and feeling secure on your own property is a fundamental right deeply rooted in American society. (Omaha Mun. Code 1980, §18-2, Sec 18-2-18-5 See App. 32-33) These claims were included within the complaint that was before the Douglas County District Court and in the record before the Nebraska Court of Appeals. (App. 65)

Petitioners also alleged a violation of due process rights before the district court by providing evidence that Respondent failed in their statutory duties to provide notices pertaining to the improvements by petition and failure of their non discretionary duty to warn of dangerous conditions they were aware of prior to the first accident occurring. "The essence of due process is that a person be given notice and an opportunity for hearing." *Mathews v. Eldrige, 424 U.S 319, 348 (1976); R.R.S. 1943, §14-390.* ; Omaha Municipal Codes 1980, Sec. §26-28; 1980 Sec. §26-59 *State law references: Similar provisions, R.R.S. 1943, § 14-3, 119;*1980 Sec. §26-60, *State law references: Similar provisions, R.R.S. 1943, §14-3, 120;* 1980, §18-2, 18-4, 18-5 (App. 30-33) *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).*

Petitioners alleged a violation of due process rights before the Nebraska Court of Appeals within their questions and arguments pertaining to facts already in the record not being acknowledged or

applied by the district court while granting summary judgment in favor of Respondent. Petitioners cited Nebraska case law before the Nebraska Court of Appeals showing that a lack of a "complete and orderly examination of all the facts and circumstances connected with the case" constitutes an "infringement of rights" *State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).*

ALL FACTS AND ARGUMENTS PERTAINING TO ESTOPPEL WERE SUFFICIENTLY PLEADED BEFORE THE LOWER COURTS FOR CONSIDERATION.

Nebraska law states "A party entitled to estoppel need not in all cases formally plead the estoppel, and if the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." *Greer v. Chelewski, 76 N.W. 2d 438, 162 Neb 450.*

A recurring theme throughout Respondent's Brief in Opposition is the contention that arguments and facts were not before the lower courts to consider. In fact, a reading of the Order of the District Court and Opinion of the Nebraska Court of Appeals would have the reader convinced there was not much of a record other than the original complaint before the district court. In fact, the full record before the Douglas County District Court consists of 335 page transcript and Bill of Exceptions, 19 exhibits. For this very reason Petitioners included an intensive Appendix

and numerous references to the record within their Petition for this Court to review.

The record will speak for itself. What this Court will find upon examination of the full record is Petitioners have genuine facts and law behind every argument truthfully presented to the lower courts in a respectful manner, not "creative mischaracterization or manipulation of facts" as alleged by Respondent.

Respondent has chosen not to acknowledge or rebut certain facts that are central to the arguments in our Petition. As we could have predicted they remain silent on the facts and arguments regarding waiver, estoppel, or continuing tort that are most relevant to determining that summary judgment was improper and Respondent's reliance on a statute of limitations defense is misplaced.

Below are facts in the record before the granting of summary judgment and have not been acknowledged, opposed, analyzed, or applied at any time within this case by Respondent, the Douglas County District Court, the Nebraska Court of Appeals or the Nebraska Supreme Court.

Petitioners want to underscore the importance of certiorari to reverse the abuse of Petitioner's due process rights concerning the lower courts' lack of applying the following relevant facts on the record while granting and affirming summary judgment in favor of the Respondent.

1. Improvements were designed by a private engineering firm on behalf of West Corporation, approved by Respondent, constructed at a public intersection for the benefit of private business to improve traffic flow from an anticipated increase in traffic volume due to business expansion and related construction of a bridge overpass. (App. 81) (T171-T187) (The Respondent incorrectly states that the improvements were designed by Omaha Public Works See Brief in Opp. Page 12 Fact # 25.)

2. That Respondent City of Omaha failed to provide notice to or obtain signature from any owner of Petitioner's abutting property as required by statute. (T171-T187) *Sec. 26-59. Examination of petition. Omaha Mun. Code 1980, § 26-59; R.R.S. 1943 §14-3,119. Sec. 26-60. Publication of notice. Omaha Mun. Code 1980, § 26-60 (See App. 27)*

3. The actual Development Agreement and Improvements that abut Petitioners' property appear only in Resolution 23 that was introduced, hearing held and adopted within 24 hours. The t-intersection improvements are not referenced in any way or shown in drawings included in the related ordinances 35432 and 35637. (These facts stated in error by Respondent see Brief In Opposition Page 12, Facts 26 and 27.) (T171-T187) (T141-T159)(T188-T193)

4. The accidents occurred at the time of the anticipated heavy traffic volume increases that were discussed at a hearing not disclosed to any owner of Petitioners' property or to the public. Project was approved on this day despite overwhelming written opposition from businesses informed of the improvements. (T335-336 audio-tape)

5. Respondent City of Omaha was aware of dangerous conditions being created by said improvements leading to increased traffic volume and failed in their non discretionary duty to warn any owner of Petitioner's property as required by Nebraska law. *Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).* (T323-334) (T335-336 audiotape)

See Also Petition App. 94-97 for further references showing the all elements of estoppel are present.

CONCLUSION

Writ of Certiorari should be granted to allow the full record and related law to control the direction of this case for the very first time

The Nebraska Courts have violated Petitioners' due process rights by refusing to acknowledge and apply facts that would render the granting and affirmation of summary judgment improper and unjust. These actions constitute a radical departure from the usual course of judicial

proceedings and should invoke the supervisory powers of the United States Supreme Court to intervene on behalf of Petitioners.

Other state courts have determined that summary judgment during ongoing discovery should be avoided. However, regarding summary judgment while court ordered discovery is pending, we request this Court to consider an opinion that summary judgment is always improper with no instructions, hearings, motions, or stipulation within a reasonable time.

Petitioners urge this Court to request and review the full record including the audiotape of the hearing on Resolution 23, the transcript of the 2 ½ hour deposition of Patricia Gard, the video of oral arguments before the Nebraska Court of Appeals, and the correspondence between the City of Omaha, the Nebraska Department of Roads and the Federal Highway Administration.

For these reasons our Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

/s/ Clinton C. Gard
/s/ Patricia Gard
931 N 121 St.
Omaha, NE 61854
(402) 342-3150

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No. 10-1260

Supreme Court, U.S.
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In the Supreme Court of the United States

Clinton Gard,
Patricia Gard,
Petitioners

vs

City of Omaha,
Respondent

On Petition for Writ of Certiorari to the Nebraska Court of Appeals

Petition for Rehearing

Clinton and Patricia Gard
Pro Se Petitioners
931 N 121 St.
Omaha, NE 68154
(402) 342-3150

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NE law references: Similar provisions, R.R.S. 1943, § 14-3,119. Sec. 26-60. Publication of notice. Omaha Mun. Code 1980, § 26-60 (See App. 27)..... 4

PETITION FOR REHEARING

Pursuant to Rule 44.2 Petitioners respectfully petition for rehearing of the Court's Order denying certiorari in this case.

THIS PETITION SHOULD BE GRANTED DUE TO CONFLICTS OF INTEREST THAT EXISTED WHILE DENYING PETITION FOR WRIT OF CERTIORARI.

28 U.S.C. §455 provide standards for judicial disqualification or recusal. Section 455, captioned "Disqualification of justice, judge, or magistrate judge," provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The same section also provides that a judge is disqualified "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding"; "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

On June 13, 2011 this Court denied the Petition for Writ of Certiorari. The following day Petitioners became aware of the following conflicts of interest that create intervening circumstances of a substantial or controlling effect:

1. Justice Clarence Thomas has very close family ties to the engineering firm of Lamp, Rynearson & Associates, Inc.[1] who designed the intersection improvements at issue within this case on behalf of the City of Omaha, West Corporation, Silvercrest Development, Inc., Miracle Hills Park Assn., & Miracle Hills VI L.P. (T171-187) (App 81).

2. Justice Thomas' wife, Virginia Lamp Thomas worked as legislative director for Congressman Hal Daub, a "friend of the Lamps"[2]. Mr. Daub as mayor was named as a defendant along with Respondent City of Omaha in *Waite v. City of Omaha, Douglas Co District Court 1001-116, also Nebr Supreme Court S01-193)* involving the development agreement that included the intersection improvements at issue within the Petition for Writ of Certiorari. Mr. Daub is also a lobbyist for West Corporation, a party to the development agreement. Documents pertaining to this lawsuit were withheld by Respondent Omaha

[1] Sue Story Truax. (11/18/2009) Donald Lamp Known for His Vision. Omaha World Herald. Omaha.com/article/20091118/NEWS01/711189923

[2] Laura Blumenfeld (9/10/1991) The Nominee's Soul Mate. Washington Post. http://www.washingtonpost.com/wp-srv/national/longterm/cult/lifespring/main.htm See also Paul Richter (10/13/1991) Virginia Thomas: Los Angeles Times. http://articles.latimes.com/1991-10-13/news/mn-1053_1_clarence-thomas ; and Virginia Lamp Thomas. Wikipedia. http://en.wikipedia.org/wiki/ Virginia _Lamp _Thomas

in violation of court ordered discovery that was ongoing at the time summary judgment was granted in favor of Defendant/Respondent City of Omaha. (App. 51-64)

3. Justice Thomas did not recuse himself or indicate that he took no part in the consideration or decision of this case.

THIS PETITION SHOULD BE GRANTED BECAUSE THE DENIAL OF CERTIORARI IN THIS CASE CONDONES AND ENCOURAGES FUTURE VIOLATIONS OF DUE PROCESS RIGHTS BY THE LOWER COURTS.

The issues raised within Petitioners' Petition for Writ of Certiorari address a decision of the lower courts that conflicts with the opinion of the United States Supreme Court *Celotex Corp. v. Catrett 477 U.S. 317, 106 S.Ct. 2548* and with other state court of appeals. (Petition Pgs 10-12, Reply Brief Pgs 4-7)

A review of the full record, transcript of hearing, the Order and Opinion plainly reveals that the lower courts and Respondent City of Omaha worked in tandem to suppress evidence by not disputing, acknowledging, analyzing or applying certain material facts on the record and related law within any argument, order or opinion within this case at any time despite these facts being raised multiple times by Petitioners before the lower courts within pleadings and during oral argument.

(Reply Brief Pgs 10-12) The denial of certiorari results in this Court's approval of the Nebraska Court of Appeals and the District Court acting in a manner that constitutes a radical departure from the usual course of judicial proceedings.

THIS PETITION SHOULD BE GRANTED BECAUSE THE DENIAL OF CERTIORARI IN THIS CASE CONDONES AND ENCOURAGES FUTURE VIOLATIONS OF DUE PROCESS RIGHTS BY MUNICIPALITIES.

The denial of certiorari condones the abuse of Petitioners' due process rights beginning with Respondent's violating their own statutory notice laws and withholding knowledge of a possible claim and dangerous conditions prior to Petitioners becoming aware of their damages.

If Petitioners had the opportunity to sign the petition for street improvements as record owners of abutting property as required by law (*Examination of petition. Omaha Mun. Code 1980, §26-59 See App. 27)* and had the opportunity to attend hearings regarding the improvements, (*Publication of Notice. Omaha Mun. Code 1980 §26-60 See App. 27)* Petitioners would have opposed the plans and had an opportunity to be heard, negotiate changes to improve safety, or even prevent the improvements and subsequent heavy traffic volume increases from occurring. The first accident occurred at the very time that was discussed at a hearing not disclosed to Petitioners

or the public as being the beginning of the highest volume of traffic due to the new traffic volume of the business expansion combined with overflow traffic from the Dodge Street overpass project.

Petitioners should have had the opportunity to respond to a statements at the hearing regarding the coming "crush of traffic" (Audio T336-337) as all westbound traffic out of the business/ retail area proceeds directly toward our property on the level.

"The essence of due process is that a person be given notice and an opportunity for hearing." *Mathews v. Eldrige, 424 U.S 319, 348(1976.)*

Respondent repeatedly misrepresented that the federal government prohibited changes to the intersection even after a second accident occurred, then for several months appeared to be engaged in working toward a solution with a state committee before abruptly walking away stating there was no solution to the problem. The City acknowledged by their actions the existence of dangerous conditions and their intent to remedy by starting to work towards a solution.

Respondent makes false statements numerous times, even within an affidavit, that city engineers designed the intersection changes. The development agreement and hearing (T171-187, T335-336 audio) clearly show plans are designed by Lamp Rynearson and presented to the City by an attorney representing West Corporation. The lower courts were aware of misrepresentation occurring in their courtrooms with no consequence and Respondent still attempts to perpetuate this lie before the United States Supreme Court within

their Brief of Respondent in Opposition for A Writ of Certiorari, Pg 12, No. 26.

Under these circumstances the complete denial of injunctive relief, compensation for damages, even a fair trial has far reaching consequences by setting improper precedence that emboldens elected officials and governmental employees to further disregard the law.

THIS PETITION SHOULD BE GRANTED BECAUSE DENYING CERTIORARI LEAVES A FAR REACHING QUESTION UNANSWERED WHETHER SUMMARY JUDGMENT CAN EVER BE ACCEPTABLE DURING COURT ORDERED DISCOVERY WITH NO FURTHER HEARINGS, INSTRUCTIONS, MOTIONS, OR STIPULATIONS. Reply Brief Pages 2 – 5.

IT APPEARS THAT JUSTICE THOMAS HAS A CONFLICT OF INTEREST IN THIS CASE, AS WELL AS BEING THE CONFLICT OF INTEREST OF THE LOWER COURTS IN THIS CASE.

It can be a reasonable assumption that the Respondent City of Omaha, the Douglas County District Court, the Nebraska Court of Appeals, and the Nebraska Supreme Court were aware of close associations between Justice Thomas, Lamp Rynearson & Associates, Hal Daub, and West Corporation in connection with the development agreement that included the intersection improvements abutting Petitioners' property.

There is an overwhelming appearance of Justice Thomas having a conflict of interest in this case, as well as actually being the conflict of interest of the lower courts. Certainly this extraordinary circumstance can be a reasonable explanation for the "disappearing facts" (Petition Pgs 3-6, Reply Brief Pgs 10-12, the abrupt, premature granting of summary judgment during court ordered discovery, and the Nebraska Court of Appeals denial of Petitioners' reasonable requests to reinstate appeal and amend our Petitions for Further review and to Stay the Mandate upon the discovery of a previous lawsuit directly tied to the same intersection improvements that abut our property that was withheld in violation of court ordered discovery.

"The essence of due process is that a person be given notice and an opportunity for hearing." *Mathews v. Eldrige, 424 U.S 319, 348(1976); R.R.S. 1943, §14-390*

For the foregoing reasons this Petition for Rehearing should be granted.

Respectfully submitted,

/s/ Clinton C. Gard
/s/ Patricia Gard
931 N 121 St.
Omaha, NE 61854 (402) 342-3150

CERTIFICATE

Pursuant to Rule 44(2) Petitioners hereby certify that the foregoing Petition for Rehearing is restricted to the grounds specified in this paragraph and submitted in good faith and not for purpose of delay.

/s/ Clinton C. Gard

/s/ Patricia Gard
931 N 121 St.
Omaha, NE 61854
(402) 342-3150